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No. _____

Supreme Court of the United States

OCTOBER TERM, 1987

SELIGMAN & ASSOCIATES, INC.,
Petitioner,

-v-

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

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QUESTION PRESENTED

In this case an employer made an offer of reinstatement to two discharged employees by communicating the offer through an agent of the National Labor Relations Board, using the Board agent to avoid a question of coercing the employees by direct communications. The Board agent did not accurately communicate the offer, but the employees clearly rejected any kind of reemployment. In light of that rejection of reemployment, does the employer's back pay liability terminate?

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OPINIONS BELOW

In the back pay phase of this case, the opinion of the Court of Appeals for the Sixth Circuit is reported at 808 F2d 1155 (1986). The supplemental decision and order of the National Labor Relations Board is reported at 273 NLRB 1216; 1984-85 NLRB Dec (CCH) ¶17,020; 118 LRRM (BNA) 1309 (1984). The administrative law judge's supplemental decision is published, at 273 NLRB 1219 (1983). The ALJ's erratum, app 60, is not published.

In the unfair labor practice phase, the sixth circuit opinion is reported at 639 F2d 307, *cert denied*, 454 US 838 (1981). The NLRB decision and order is reported at 240 NLRB 110; 1978-79 NLRB Dec (CCH) ¶15,543 (1979). The ALJ's decision is reported at 240 NLRB 111 (1978).

JURISDICTION

The court of appeals judgment was dated and entered June 8, 1987. The court denied Seligman's petition for rehearing on July 28, 1987. This Court has jurisdiction under 28 USC 1254(1) and 29 USC 160(e). Seligman filed within the 90 day period required by 28 USC 2101(c) and Supreme Court Rule 20.2.

STATUTE INVOLVED

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

Section 10(c), National Labor Relations Act (NLRA); 29 USC 160(c).

STATEMENT OF THE CASE

Susan and David Younce were caretakers at an apartment project managed by Seligman & Associates, Inc.[1]. This petition involves the National Labor Relations Board's order that Seligman reinstate the Younces and an award of back pay that, with interest, totals over $40,000.[2]

The Younces were discharged October 7, 1976. App 28, 43. The Younces received free use of an apartment as part of their compensation. App 2, 43. After their termination, Seligman sent them an eviction notice on October 26. App 2, 28, 43,. Two days later, Susan Younce filed an unfair labor practice charge. *Id.* The Board assigned an agent in its regional office, Richard Whiteman, to investigate the charge.

Shortly after Younce filed the charge, Seligman's attorney, Irwin Alterman, investigated it, concluded it had merit, and recommended to Seligman that it settle the claim by reinstating the Younces at another apartment complex with back pay. App 2, 28-29, 43-44. Alterman contacted Whiteman on November 8 to convey the reinstatement offer to the Younces. App 2, 29, 44. Alterman testified he used the Board agent as an intermediary to avoid any inference of coercion against the Younces. *Accord*, app 2. Although the evidence was in conflict, the ALJ credited Susan Younce's testimony that Whiteman conveyed only a "hypothetical" offer, asking her "if Mr. Seligman offered you

[1] Following is the listing of subsidiaries (except wholly owned subsidiaries) and affiliates required by Supreme Court Rule 28.1: Sterling Savings and Loan Association.

[2] There are several other aspects of the Board's order involving other employees and matters that Seligman does not challenge in this petition.

your job back with backpay, would you take it?"[1] Younce replied, "No, I don't want to work there anymore. I don't even want to be around here anymore." App 2-3, 29, 44-45. After this conversation, Whiteman informed Alterman the Younces did not want their jobs back. *Id.*

After this exchange through Board agent Whiteman, Susan Younce met with Alterman at his office. App 3, 30, 46. There she signed a letter to the Board withdrawing the charge. She also signed an affidavit stating her reasons for dropping the charge, specifically acknowledging that she had received a reinstatement offer through Whiteman, and that she told Whiteman she did not want her job back. App 30. This original unfair labor practice charge was withdrawn, with the Board's approval. Whiteman concluded in an internal memo that the charge should be dropped because of Susan Younce's insistence and because there was no indication of coercion. The Younces filed a subsequent charge, leading to the proceedings in this case. *Id.* In hearings on that charge, the Board held Seligman improperly discharged the Younces. 240 NLRB 110 (1979), *enforced*, 639 F2d 307, *cert denied*, 454 US 838 (1981).

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[1] There was substantial evidence (including the Younce's previous testimony at the 1977 unfair labor practice hearing, Susan Younce's signed affidavit, Whiteman's notes of his conversations with Younce and Alterman, and an internal Board memo) that Whiteman conveyed an unconditional offer to Younce. The Board disclosed the latter two items only after the sixth circuit ordered disclosure in a freedom of information case. *Seligman & Associates, Inc v NLRB*, Case No 83-1017 (May 30, 1984). This petition does not challenge the Board's factual finding that Whiteman conveyed only a "hypothetical" offer.

Although the main communications were with Susan Younce, it was clear at all times she was speaking on behalf of her husband. The position involved was that of a caretaker couple so that all parties assumed any offer and rejection applied to both Younces. 240 NLRB 110, 115 (1979) (Younces were hired and worked "as a caretaker couple"); transcript 6/7/83, p 162 (Susan Younce's acknowledgment that the job was for both of them). *See* app 34 (Hunter, dissenting) ("Younces were hired and fired as a caretaker couple"). David Younce's testimony confirmed he understood the conversations to apply to him. Transcript 7/12/77, pp 131-132; 6/7/83, p 55. The discussions focussed on Susan Younce because, at that time, she was the only charging party. *Cf.* 240 NLRB 110, 115 (1979).

After a hearing in June 1983, an ALJ entered a supplemental decision and order. App 39; 273 NLRB 1219 (1983). He held the reinstatement offer was insufficient to terminate Seligman's back pay liability because (1) it was not an offer of reinstatement to the same position, since it required a move to a different apartment complex and (2) it was not an unconditional offer because Whiteman conveyed only a "hypothetical" offer. The ALJ held Seligman took the risk of Whiteman not properly conveying the offer. App. 49. He also rejected Seligman's argument that the Younces' rejection of reemployment should stop back pay liability even if the reinstatement offer were not valid. App 49.

The Board affirmed the ALJ's decision with minor modifications. App 27; 273 NLRB 1216 (1984). Board Member Hunter dissented. App 34. He would have found that the Younces' unequivocal rejection of reemployment tolled back pay as of November 11, 1976, the day of the meeting in Alterman's office. App 34. He noted Younce knew what reinstatement entailed from her conversation with Whiteman and "Younce's rejection of employment was not a quick reaction on her part. The record shows that she had arrived at this decision several days earlier [than the meeting with Alterman] and had first communicated her decision in the conversation with Board Agent Whiteman." App 35. Member Hunter relied on this "unsolicited refusal of employment" that Whiteman communicated to Seligman's attorney. *Id.* Member Hunter also relied on Younce's rejection of reemployment in Alterman's office, finding that the circumstances were not coercive. *Id.* The Board majority rejected Member Hunter's view because the majority found the circumstances in Alterman's office were coercive. App 31-32. It did not expressly address the question whether the Younces' rejection of reemployment through agent Whiteman, which occurred before the meeting in Alterman's office, was sufficient to stop back pay liability. It rejected this argument by implication when it held there must first be a clear unequivocal reinstatement offer. App 31. Seligman moved for a rehearing of the panel's split decision before the full Board. The full Board denied that

motion, with Member Hunter again dissenting. The Board filed an application for enforcement in the sixth circuit. The court of appeals had jurisdiction under 29 USC 160(e).

The court of appeals granted enforcement in part and remanded for recomputation of back pay. App 1. The court affirmed the Board on the invalidity of the reinstatement offer. App 7-12. On the question whether the Younces' rejection of reemployment terminated Seligman's back pay liability even if the reinstatement offer were not valid, the court affirmed the Board's holding that Susan Younce's visit to Alterman's office was under coercive circumstances. It held her statements to Alterman, signing the letter withdrawing the charge, and signing the affidavit stating she did not want her job back did not amount to a clear enough voluntary refusal of reemployment to terminate back pay. App 12-16. The court did, however, hold the Younces failed to seek other comparable employment in mitigation of their damages. App 17-25. It remanded for recomputation of back pay on that ground.

Seligman petitioned for rehearing. Seligman pointed out that it made two alternative arguments about the Younces' rejection of reemployment. It argued first that their rejection of the offer through agent Whiteman stopped back pay liability. Seligman argued alternatively that the rejection in Alterman's office also stopped back pay. The court of appeals recognized that Seligman made both these arguments (app 6, 12), but addressed only the second. Seligman's petition for rehearing asked the court to address the alternative argument that the Younces' refusal of reemployment through agent Whiteman (which occurred before the supposedly coercive meeting with Alterman) should terminate back pay liability. The court denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

The decisions below held that clear rejection of reemployment does not terminate an employer's back pay liability when the employer uses an agent of the

National Labor Relations Board to convey a reinstatement offer and the agent inaccurately communicates the offer through no fault of the employer. Whether imposing back pay liability under these circumstances carries out the policies of the National Labor Relations Act is an important question of federal law that has not been, but should be, settled by this Court. It is a question on which the Board has been inconsistent and the circuits are in conflict.

The touchstone for the Board's discretion in imposing back pay is that it must "effectuate the policies of [the NLRA]". 29 USC 160(c). For an award of back pay, the policy is to make the employee whole and to deter the employer from future conduct violating the employee's rights.

When an employer uses the Board agent investigating the unfair labor practice charge to communicate a reinstatement offer, the agent does not accurately communicate it, but the employees nonetheless clearly reject reemployment and the agent tells the employer so, neither of these policies is served by awarding back pay. The employee, who would not have returned to work, receives a windfall. The employer, who thought he made a proper reinstatement offer, pays a penalty.

This Court has not ruled on the question whether rejection of reemployment before there has been a valid reinstatement offer can stop back pay liability. It should grant certiorari to address that question and hold that a clear rejection of reemployment, at least under the circumstances presented in this case, ends back pay liability. The question is an important question of federal labor law which has recurred through the years. Neither the Board nor the courts of appeals have been consistent in dealing with it.

The Board applied an absolute rule in this case, holding that "only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled." App 31. The Board would require a reinstatement offer "even

in the face of a discriminatee's apparent understanding and repudiation of the concept of reinstatement." App 31. *See also* the court of appeals' characterization that "[t]here is certainly substantial evidence to indicate that Susan Younce was knowledgeable about her rights and that she did not want her job back." App 16. Under the Board's absolute rule, an employee's rejection of reemployment cannot stop back pay liability unless the employer first makes a technically correct reinstatement offer. It does not matter how unequivocal and adamant the employee's rejection of reemployment is. It does not matter that the reinstatement offer is technically insufficient because a Board agent incorrectly transmitted it.

The Board has not applied such an absolute rule in other cases. *E.g., Research Designing Service, Inc*, 141 NLRB 211 (1963) (although reinstatement offers were invalid because they did not include reinstatement with full seniority, employees' rejection of reemployment for other reasons terminates back pay liability); *L Ronney & Sons Furniture Mfg Co*, 97 NLRB 891 (1951), *enforced as modified*, 206 F2d 730 (CA 9 1953) (employees not entitled to reinstatement when they refused reemployment for reasons unrelated to illegal condition attached to offer).

One or two circuits seem to have adopted an absolute rule. *EEOC v Sandia Corp*, 639 F2d 600, 627-628 (CA 10 1980) (age discrimination case applying NLRB precedent by analogy); *NLRB v WC McQuaid, Inc*, 617 F2d 349, 354-355 (CA 3 1980). Although the Board relied on *McQuaid* here, app 31 n10, it is readily distinguishable. The court there held an employee does not waive the right to reinstatement by failing to respond to an invalid reinstatement offer. Here, there was no failure to respond. The question here is whether employees' clear response that they did not want their jobs stops back pay liability even though the reinstatement offer may not have been technically valid.

Other circuits have not applied an absolute rule. The District of Columbia circuit holds the Board must consider the

employee's reasons for rejecting an invalid offer and decide whether the employee would have refused the offer even if it were valid. *Consolidated Freightways v NLRB*, 669 F2d 790, 798 (CA DC 1981). It relied on previous Board precedent and other court of appeals cases in formulating this rule. The second circuit suggests an employee's expressed intent to reject reemployment is relevant when, as here, the employer relies on that in delaying or not making a reinstatement offer. *Heinrich Motors, Inc v NLRB*, 403 F2d 145, 150 (CA 2 1968).

The court of appeals here recognized this split in the circuits. App 12-13. It did not expressly choose a rule. But it concluded (mistakenly) that the Board's analysis was consistent with the more generous DC circuit rule. Although the Board applied an absolute rule ("only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled." App 31), the court of appeals said the Board "thoroughly discussed the circumstances surrounding the Younces' refusal." App 16. The court found there was not a sufficiently clear refusal of reemployment. *Id.*

Thus both the Board and the various circuits, including the sixth circuit in this case, have been inconsistent in dealing with a situation such as this, a situation that could frequently arise.

The court should grant certiorari in this case to establish a clear rule about the consequences of an employee's clear, voluntary rejection of reemployment. The circumstances here are compelling for the employer, who acted in good faith, using the Board agent to avoid a question of coercing the employees by direct communications. Where the employees clearly and voluntarily reject any kind of reemployment, the employer should not be liable for continuing back pay because there was not a technically sufficient reinstatement offer due to the Board agent's miscommunication. In these circumstances, a back pay award would be punitive, not remedial.

The result, of course, should be different if the employees did not clearly manifest a rejection of reemployment, such as

in *McQuaid*. There the employee simply did not respond. 617 F2d at 354-355. Here, however, there could be no doubt the Younces no longer wished to work for Seligman. They made this clear to agent Whiteman. His memo to the Board's regional director confirmed they "wanted neither reinstatement nor any backpay." All the evidence subsequent to this confirms the Younces did not want to return to work for Seligman. Susan Younce's 1983 testimony confirmed she and her husband did not want their jobs back. Transcript 6/7/83, pp 99, 114, 161, 162, 164; 6/9/83, p 237. Seligman again offered the Younces reinstatement in January 1984 (a matter not of record in the present proceedings but an offer the Board knows was made in precisely the words required by the ALJ's 1983 decision). They again rejected reemployment in writing.

Likewise, back pay liability should not terminate if the rejection of reemployment was made under coercive circumstances. Thus here, if the *only* offer of reinstatement were made in Alterman's office, continued liability because of so-called coercive circumstances might be justified. But here, Seligman first made the offer through the Board agent investigating the charge *precisely to avoid a charge of coercion.*

The purpose of avoiding a later charge of coercion is particularly significant given the Board's basis for finding coercion here. The Board's applied a *per se* coercion rule here. App 35 (Member Hunter, dissenting). It held that, after an unlawful ("coercive") discharge, a meeting discussing any benefit lost as a result of the discharge is coercive. App 31 n12 ("As the law of this case, the discharge was coercive. It is fallacious to suggest that the meeting to obtain a lease as a direct consequence of such coercion was itself devoid of coercion.") Dissenting Member Hunter viewed this rule as meaning "any meeting between an employee and his employer to discuss the effects of an unlawful discharge, including settlement conferences between an employee and his employer to discuss any wages, benefits, or privileges lost through an unlawful discharge, is coercive irrespective of the factual circumstances surrounding such meetings." App 35. If that is the rule for

establishing coercion, it is all the more important that an employer be able to rely on a good faith attempt to communicate through a Board agent and the agent's truthful response that the employees do not want their jobs back. Continuing back pay liability until the employer makes a technically sufficient reinstatement offer would, as dissenting Member Hunter put it, "require an employer in this situation to simply extend a futile offer of reinstatement literally only 'for the record.' " App 34.

CONCLUSION

Since both the Board and the courts have been inconsistent, this court should grant certiorari to establish a clear rule: An employer's back pay liability should terminate if employees clearly, voluntarily reject reemployment.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-5404

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SELIGMAN AND ASSOCIATES, INC., and its Wholly Owned Division, Scott Management Company,

Respondent.

ON PETITION for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed December 30, 1986

Before: ENGEL, KENNEDY and MILBURN, Circuit Judges.

ENGEL, Circuit Judge. The National Labor Relations Board petitions for enforcement of its order requiring Seligman & Associates, Inc., to pay backpay to two former employees, to pay the medical expenses of a third former employee, and to post notices describing the remedial action ordered. *Seligman & Assoc., Inc.*, 273 N.L.R.B. 1216 (1984). We enforce the order as to the payment of medical expenses and the posting of notices; we remand the determination of backpay for recomputation based on our conclusion that the two former employees willfully failed to seek comparable employment to mitigate their losses.

A division of Seligman, Scott Management Co., operates a number of apartment complexes in the Detroit, Michigan area. On January 24, 1979, the Board found that Seligman had committed unfair labor practices by, among other things, discharging David

and Susan Younce in retaliation for protected activity, in violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), and discharging Clarence Goold because of his union activity, in violation of section 8(a)(1) and (3), 29 U.S.C. § 158(a)(1), (3) (1982). *Seligman & Assoc., Inc.*, 240 N.L.R.B. 110 (1979). The Board ordered Seligman to offer its unlawfully discharged employees reinstatement to their former positions, to make them whole, and to post notices. *Id.* This court granted judgment enforcing that order. *Seligman Assoc., Inc. v. NLRB,* 639 F.2d 307 (6th Cir.), *cert. denied,* 454 U.S. 838 (1981). The present enforcement petition arises out of a supplemental decision and order by the Board specifying the amount of backpay due David and Susan Younce, the amount of medical compensation due Clarence Goold, and the contents of the required notice.

David and Susan Younce had been employed by Seligman as apartment complex caretakers at Seligman's Eureka Apartments. They received salaries as well as housing at the complex as compensation. Following their termination they continued to occupy their townhouse apartment until they received a notice to quit the apartment on October 26, 1976. Two days later, Susan Younce filed an unfair labor practice charge with the Board. Seligman's attorney, Irwin Alterman, investigated the charge and recommended to Seligman that they settle the claim by offering the Younces caretaker positions at another apartment complex some 30 to 50 miles distant, with backpay.[1] Seligman agreed and its attorney contacted Board agent Whiteman to convey the settlement proposal.[2] Whiteman contacted Susan Younce and, according to her testimony as credited by the ALJ, asked her, "If Mr. Seligman offered you your job back with backpay, would you take it?" Younce replied, "No, I don't want to work there anymore. I don't even want to be around here anymore." Whiteman responded, "You

[1]Seligman contends that the change of location was compelled by conflicts between the Younces and the resident manager at Eureka.

[2]At oral argument, Seligman's attorney stated that they employed the Board agent as an intermediary in order to avoid any inference of coercion against the Younces.

know you could get your backpay without taking your job back," and Younce replied, "Fine." Following this conversation, Whiteman informed Seligman's attorney that the Younces did not want their jobs back. The Younces later received a notice from Seligman requesting that they report to the Utica Green apartment complex for work. They did not respond.

On the fifth or sixth of November, while her husband and three children were ill, Susan Younce contacted Scott Seligman directly, told him of her family's illness, and asked if they could remain in the apartment as paying tenants. Seligman replied that they could, provided she drop her unfair labor practice claim. On November 8, Susan Younce called Whiteman to tell him that she wanted to drop the charge. Whiteman advised against doing so, and informed her that if she nevertheless wanted to relinquish the claim, she would have to do so in writing. She next called Scott Seligman again, who advised her to obtain a withdrawal request form from the Board and to go to his attorney's office to sign a lease.

On November 11, the Younces received another eviction notice. The next day, Susan Younce met with Seligman's attorney at his office. After discussing her desire and attempts to drop the charges, the attorney informed Younce that she would have to sign an affidavit describing her attempts to withdraw the charges. He then dictated both an affidavit and a withdrawal letter which, after some changes in style, Younce signed.

The ALJ credited Susan Younce's testimony throughout the hearing, including the following account of her meeting with Seligman's attorney:

> I was supposed to go there to get a lease and instead, I got these [the affidavit and withdrawal letter] .... Now I'm a little bit calm about it, but when this was taking place I was nervous and upset and I don't think I was in the right [frame of] mind to really know

> what I was doing. I went to [Alterman's] office for a lease and I ended up having to do all this. I felt pressured in [his] office when I wrote it for one thing, and I said, "Yes, it is okay," and I signed it just to get out of there.

In its supplemental decision and order, the Board accepted the ALJ's determination that: (1) Seligman had extended only a hypothetical reinstatement offer to the Younces; (2) the reinstatement offered was not to their former positions, but to similar positions at a different location and for different mangement; and (3) Seligman must bear the cost of any confusion in the reinstatement offer resulting from its use of a Board agent as an intermediary with the Younces. It further concluded that Susan Younce was intimidated at her meeting with Seligman's attorney and that her statements made then that she did not desire reinstatement were not binding. It accordingly determined that Seligman's backpay obligation to the Younces was not tolled and that the Younces were entitled to backpay in the amount of $27,557.96.

The Board further ordered Seligman to pay directly to the hospital and doctor the medical expenses incurred by Clarence Goold, but never paid by him. Finally, the Board ordered that the notices to be posted by Seligman include references to the remedies afforded the Younces, Goold, and six other former employees.

Seligman argues that the Younces declined valid reinstatement offers, that they suffered a willful loss of earning following their discharge, and that the Board erred in calculating their backpay. Seligman further contends that it owes nothing to the hospital and doctor for Goold's medical treatment because the hospital and doctor are now barred from collecting on those debts. Finally, Seligman maintains that the notices should contain no reference to the remedies afforded the Younces and Goold under the order or to the remedies afforded six other employees whose claims were settled.

First, we have little difficulty enforcing the Board's order directing Seligman to reimburse the hospital and doctor for Goold's medical treatment, even though those charges might now be subject to a statute of limitations defense were Goold sued for their collection. In his dissent, Board member Robert B. Hunter noted that as of the date of the Board's opinion, Goold had not been required to pay the bills incurred in 1976 and 1977. He noted that Seligman had excepted only to the payment of the medical expenes directly to Goold, which might result in a windfall to him, since there was no assurance that he would ever be obligated to pay those creditors. The dissenting member would therefore order respondent to indemnify Goold if any collection action on the bills were instituted. In effect, the dissenting Board member would only have required Seligman to hold Goold harmless from liability rather than to pay the bill. The Board ordered payment of those bills directly to the providers of the services.

We are furnished no evidence, other than of the passage of time, that the payment of these bills may be subject to an effective statute of limitations defense. The passage of time does not act to extinguish the debt, of course, but may under an applicable statute of limitations bar legal action to recover it. Since the delay or failure to pay the bill is at least arguably a result of Seligman's unlawful refusal to honor the debt in the first place, respondent is in a poor position to take advantage of its own improper conduct. Even assuming the statute of limitations applied and there was no tolling under state law, the debt can remain upon the books and have an adverse effect upon the employee's ability to obtain future medical services from those providers or from others who may be aware that previous providers had not been paid. Thus, the unpaid debt, even if uncollectible legally, can still have an adverse effect upon Goold attributable to the respondent's 8(a)(3) and 8(a)(1) violations. The Board's ruling here is consistent with the Supreme Court's holding that the "make whole" remedial power of the Board is "a broad discretionary one, subject to

limited judicial review." *Fibreboard v NLRB*, 379 U.S. 203, 216 (1964). The Board's order with reference to Clarence Goold is therefore enforced in full.

DAVID AND SUSAN YOUNCE

Seligman raises the same argument here that it presented to both the ALJ and the Board. Seligman first argues that the Younces received and rejected a valid offer of reinstatement which tolls the accrual of backpay. It next contends that even if its offer was invalid, the Younces are estopped from seeking backpay because the offer was invalidated through an error by the Board in transmitting the offer and, since this error was not disclosed to Seligman, Seligman believed it had been a valid offer. It further notes that the Younces unequivocally repudiated any desire for reinstatement and that, based upon its good faith belief that it had made a valid offer, Seligman relied upon this repudiation in not correcting any technical deficiences in the offer actually made. Third, Seligman claims that the Younces suffered a willful loss of earnings by refusing reinstatement to a different position and failing to seek similar available employment. Finally, Seligman maintains that the ALJ made errors in calculating the backpay due the Younces.

In *Morvay v Maghielse Tool and Die Co.*, 708 F.2d 229 (6th Cir.), *cert. denied*, 464 U.S. 1011 (1983), our court discussed the requisites of a reinstatement offer that will terminate backpay accrual:

> The purpose of an offer to reinstate is to "undo the employer's wrong by restoring the employees to the position they would have occupied before the wrong occurred." *Ridgely Mfg. Co. v. NLRB*, 510 F.2d 185, 188 (D.C. Cir. 1975). Therefore, an offer is insufficient to terminate back pay liability; if it is conditional upon an employee's reapplying of his job; if it does not restore seniority or other benefits accrued by the employee; if the job which he is offered is temporary; if it is conditioned upon the

> employee relinquishing his unfair labor practice claim; if the employee has insufficient time to accept the offer; or if it is conditioned upon the union steward resigning. Respectively, *Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974); *Ridgely Mfg. Co., supra; Oil, Chemical and Atomic Workers International Union, AFL-CIO v. NLRB*, 547 F.2d 598 (D.C.Cir.1976); *NLRB v. Midwest Hanger Co.*, 550 F.2d 1101 (8th Cir.1977); *NLRB v. Murray Products, Inc.*, 584 F.2d 934 (9th Cir. 1978); and *Associated Truck Lines, Inc. v. NLRB*, 653 F.2d 241 (6th Cir.1981). However, reasonable conditions accompanying the offer do not invalidate it. *Ridgely Mfg., supra* (condition that employee follow rules and regulations of the company was unreasonable only because it was a pretext to suppress employee's union activities). And, finally, to terminate an employer's back pay liability, the reinstatement offer must be clear and actually communicated to the discharged employee. *Kenston Trucking Co., supra.*

Id. at 232. In *Morvay*, the court noted that the company had offered reinstatement to the unfairly discharged employee's former position and the employee understood that he would be restored to the position he occupied before his wrongful discharge. In spite of other conditions on reinstatement, our court found the offer sufficient to terminate the accrual of backpay.

In the present case, Seligman did not extend an offer of reinstatement to the Younces' former position, but rather to a position at another complex some 30 to 50 miles distant, a position that the Board found was not comparable. Seligman argues, though, that the position at Utica Green was the same or substantially equivalent to the Younces' former position and therefore satisfied its obligation to offer reinstatement.

Although it is generally stated that an employer must offer unfairly discharged employees their former positions or sub-

stantially similar ones, the First and Tenth Circuits have held that the employer does not really have an option:

> Generally, when employees are unlawfully discharged and the NLRB orders reinstatement to their former or substantially equivalent positions, the employer does not have a choice of offering either the former or an equivalent position. If the former position still exists, he must offer that one.

NLRB v. Jackson Farmers, Inc., 457 F.2d 516, 518 (10th Cir. 1972); *see also NLRB v. Draper Corp.*, 159 F.2d 294, 297 (1st Cir. 1947); *Chase Natl. Bank*, 65 N.L.R.B. 827, 829 (1946).

We need not determine whether our circuit will follow the lead of the First and Tenth Circuits, however. The Board here in unequivocal language required Seligman to offer the Younces "reinstatement to their former jobs or, if their former jobs no longer exist, to substantially equivalent jobs." *Seligman & Assoc., Inc.*, 240 N.L.R.B. 110, 123 (1979). There is neither any showing nor any finding that the position at Eureka had been filled by the time Seligman communicated its conditional offer of reinstatement. Under such circumstances, Seligman's offer of reinstatement to a position at another complex did not satisfy the Board's order, the validity of which has already been upheld and cannot be relitigated here. The conditional offer of alternative employment, therefore, could not have tolled Seligman's backpay obligation.

Given the Younces' subsequently demonstrated willingness to move and the absence of any particular evidence of ties to the immediate vicinity of the Eureka Apartments, we are not prepared to say whether, had the Eureka Apartment post already been filled, the offer of a position at Utica Green might not have been substantially equivalent, or sufficiently so to have satisfied Seligman's obligation. It may well have been true also that Seligman and its attorneys in good faith believed that because of the past record of relations between the Younces and the building manager, it was in the best interest of all parties,

including the Younces, that they reenter employment with Seligman where potential personality conflicts might not exist. The difficulty is, however, that the option should have been that of the Younces as the injured party and not of Seligman, and that Seligman's offer, coming on the heels of admitted violations of the Act, could very likely be seen by Seligman's other employees as grudging compliance at best and, at worst, as punitive. An employer may not transfer employees for purposes of discouraging membership in a legal organization. *NLRB v. White Motor Company,* 404 F.2d 1100, 1102 (6th Cir. 1968). Reinstatement to another location after termination because of protected activity, absent a dominant legitimate business reason, would achieve the same result as a transfer to discourage union membership.

Even if an offer of reinstatement to the same position at another apartment complex would have satisfied Seligman's obligation, the Board contends that the offer actually conveyed to Susan Younce was hypothetical in nature and therefore was not a valid good faith offer of reinstatement. The ALJ and the Board credited Younce's testimony that Agent Whiteman relayed Seligman's offer in the following manner: "If Mr. Seligman offered you your job back with backpay, would you take it?" The Board concluded that this offer was hypothetical in nature and consequently insufficient to toll the accrual of backpay. *Seligman & Assoc., Inc.,* 273 N.L.R.B. 1216, 1217.

As noted above, our court in *Morvay,* 708 F.2d at 232, discussed the reasons for and requisites of valid offers of reinstatement. It did not state there, however, whether an offer as phrased by Agent Whiteman would be valid.

The validity of an offer should, if possible, be determined from the face of the offer and from the perspective of whether the offer reasonably puts strikers on notice that they were being offered reinstatement. *NLRB v. W.C. McQuaide, Inc.,* 552 F.2d 519, 530 (3d Cir. 1977). If the language of an offer is ambiguous, the court must look to the surrounding circumstances. *NLRB v. Consolidated Dress Carriers, Inc.,* 693

F.2d 277, 279 (2d Cir. 1982); *Kenston Trucking Co. v. NLRB,* 544 F.2d 1165, 1167 (2d Cir. 1976). "Essentially ... the validity of an offer depends on the situation in which the offeree finds himself as a result of the discrimination against him." *NLRB v. Murray Prods., Inc.,* 584 F.2d 934, 940 (9th Cir. 1978). Moreover, a reviewing court must defer to the Board's expert determinations. *Patternmakers' League of North Am. v. NLRB,* 105 S. Ct. 3064 (1985); *NLRB v. Yeshiva Univ.,* 444 U.S. 672, 691 (1978); *National Business Forms, Inc. v. International Printing Pressmen & Assistants' Union,* 457 F.2d 737, 741 (6th Cir. 1972). This deference applies both to findings of fact and construction of the Act. *Baker Mfg. Co. v. NLRB,* 759 F.2d 1219 (5th Cir. 1985).

The fact that the offer is phrased as a question does not necessarily render it invalid. *Kenston Trucking,* 544 F.2d at 1167. However, the offer must still indicate the availability of the former or a comparable position. Seligman's offer did not convey that there was a job available, unlike the offer in *W.C. McQuaide,* 552 F.2d at 529, where the employer stated, "If you want your previous job, which is available, contact me as soon as possible" *Id.* at 529. Whiteman's comments in relaying Seligman's offer did not "establish[] unequivocally that ... there [was] a position [and] that the job [was] immediately available." Whiteman's comments were more like those made in *National Business Forms,* 457 F.2d at 739, where the employer sent out letters stating, "If you wish to be considered as an applicant for reinstatement, please complete the enclosed form and return it to us." The Sixth Circuit there enforced the Board's order, which determined that the letters did not constitute valid offers sufficient to toll backpay liability. *See also Corrugated Partitions West, Inc.,* 275 N.L.R.B. No. 126 (June 28, 1985) (The question, "Are you willing to come back to work for us if we need you?" did not constitute an unequivocal offer of reinstatement.). See also *Wen Hwa Ltd.,* 208 N.L.R.B. 828, 837 n.25 (1974), stating that a question put to an employee as to whether he would return to work if offered reinstatement does not present a specific, unequivocal offer of reinstatement.

Seligman argues that the offer it conveyed to Board agent Whiteman was not hypothetical, and that it cannot be made to suffer the detrimental effects of Whiteman's error when he conveyed the offer to the Younces. However, when faced with the choice of placing the burden of Board errors on either a wrongfully discharged employee or her former employer, the Supreme Court had chosen to burden the employer. It has held that the Board does not err when it places the full cost of an unfair labor practice on the employer who committed it, even when the cost of backpay is greatly increased by the Board's own deplorable delay in processing the charge. *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969).

> Assuming without deciding that the delay in issuing the specification did violate the Board's duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement of the full back-pay remedy was an abuse of the Board's discretion. Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer. In view of "the economic hardship caused by many years of undeservedly substandard earnings," lengthy delays "must render the back pay award a wholly inadequate and unsatisfactory remedy" to the employees for the company's refusal to reinstate them. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 180 (C.A. 2d Cir. 1965). This Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.

Id. at 264-65.

Even if Whiteman violated some duty by conveying Seligman's offer as hypothetical, that mistake, like the wrongful delay in *Rutter-Rex*, would have worked to the Younces' detriment as much as to Seligman's. The Board did not exceed its authority or abuse its powers in charging the consequences

of any mistake to Seligman rather than to the Younces. This result comports with the rule that an offer of reinstatement, to terminate backpay liability, must be actually communicated to the discharged employee, *Morvay,* 708 F.2d at 232, and simply places the burden of ensuring actual communication of the offer upon the wrongdoer. Under normal rules of agency, the errors of Whiteman in this regard would be attributable to Seligman, which selected Whiteman as its agent for the limited purpose of communicating its offer.

The most difficult issue raised by Seligman is whether Susan Younce's refusal of the offer as conveyed by Board agent Whiteman or her subsequent repudiation of any desire to seek reinstatement tolled Seligman's backpay obligation by obviating the need for Seligman to make a valid reinstatement offer. The Board held that "only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled." *Seligman & Assoc., Inc.,* 273 N.L.R.B. 1216, 1217 (1984).

Two circuits have applied this rule. *Heinrich Motors, Inc.,* 403 F.2d 145 (2d Cir. 1968); *EEOC v. Sandia Corp.,* 639 F.2d 600, 627 (10th Cir. 1980). In *Heinrich,* the court quoted the Board's reasoning that the discharged employee's statement to the Board compliance officer that he did not desire reinstatement with the Company did not operate as a waiver because such statements,

> "may reflect only a momentary state of mind that is subject to change; prior to an offer of reinstatement, such statements are in the nature of answers to a hypothetical question; and the discriminatee's expression may have been made in the heat of dissatisfaction with his treatment by [the employer]."

403 F.2d at 150; *Sandia,* 639 F.2d at 627-28 (quoting the same language.[3])

In *Consolidated Freightways v. NLRB,* 669 F.2d 790 (D.C. Cir. 1981), however, the D.C. Circuit in an opinion of Judge Wald remanded to the Board a case in which the Board failed to consider the employee's reasons for rejecting a possibly invalid offer of reinstatement. The court stated that a line of Board precedent makes it necessary to inquire into an employee's reason for refusing an offer of reinstatement to determine whether the employee would have refused the offer even if it were valid. The court held:

> In view of the Board's failure to reconcile its decision in this case with its precedent, and its failure to explain its reasons for abandoning any inquiry into the reasons why a conditional offer is refused, we have no choice but to remand this case to the Board to explicate the circumstances, if any, under which an inquiry into whether an employee would have rejected a valid offer of reinstatement is proper. *See generally Road Sprinkler Fitters Local No. 669 v. N.L.R.B.,* 600 F.2d 918, 923 (D.C.Cir.1979); *N.L.R.B. v. Madison Courier, Inc.,* 472 F.2d 1307, 1326 (D.C.Cir.1972); *Burinskas v. N.L.R.B.,* 357 F.2d 822, 827 (D.C.Cir. 1966).

Id. at 798 (footnote omitted).

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[3]A different rule apparently applies to strikers, even those unlawfully discharged after the strike begins. *See Top Mfg. Co.,* 254 N.L.R.B. 976, 977 (1981); *Marlene Ind. Corp.,* 255 N.L.R.B. 1446, 1449 n.12 (1981), *enforcement denied on other grounds,* 712 F.2d 1011 (6th Cir. 1983); *Garrett Railroad Car & Equip., Inc. v. NLRB,* 683 F.2d 731, 741-42 (3d Cir. 1982); *NLRB v. Lyon & Ryan Ford, Inc.,* 647 F.2d 745, 756 (7th Cir.), *cert. denied,* 454 U.S. 894 (1981); *NLRB v. Trident Seafoods Corp.,* 642 F.2d 1148, 1149-50 (9th Cir. 1981); *NLRB v. Mars Sales & Equip. Co.,* 626 F.2d 567, 575 (7th Cir. 1980); *J.H. Rutter-Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 242-43 (5th Cir.), *cert. denied,* 414 U.S. 822 (1973); *but see NLRB v. Laidlaw Corp.,* 507 F.2d 1381, 1382 (7th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975).

The Board has previously held that for an employee's statement rejecting reinstatement to absolve the employer of its obligation to offer reinstatement, the employee must be put to a true test of deciding whether to accept reinstatement and must reveal an unequivocal rejection of the offer. *Lipman Bros., Inc.*, 164 N.L.R.B. 850, 855 (1967). Moreover, an employee is under no obligation to decide whether to accept reinstatement until an unconditional offer of reinstatement is made. *Leeding Sales Co., Inc.*, 155 N.L.R.B. 755, 757 (1965). Consequently, the Board has stated that a waiver of the right to reinstatement, absent a valid offer of reinstatement, "does not manifest an 'unequivocal resolve not to accept reinstatement.' " *Top Mfg. Co.*, 254 N.L.R.B. 976,977 (1981) (quoting *Lyman Steel Co.*, 246 N.L.R.B. 712, 714 (1979)). The Board has also uniformly held that an offer of reinstatement must be specific, unequivocal, and unconditional in order to toll the backpay period. *See, e.g., Jones Plumbing, Inc.*, 277 N.L.R.B. No. 47 (November 13, 1985) (citing *L.A. Water Treatment*, 263 N.L.R.B. 244, 246 (1982)). The Board's decisions, although not always models of clarity, are similarly consistent with its statement in *Lyman Steel Co.*, 246 N.L.R.B. 712, 714 (1979), that "it does not effectuate the policies of the Act to terminate the employee's backpay rights prior to the time a genuine offer is made, since a statement of waiver absent such an offer does not manifest 'unequivocal resolve not to accept reinstatement.' "

In *Hribar Trucking Inc.*, 166 N.L.R.B. 745, 756 n.19 (1967), *enforced*, 406 F.2d 854 (7th Cir. 1969), *Eastern Die Co.*, 142 N.L.R.B. 601, 604 (1963), *enforced*, 340 F.2d 607 (1st Cir. 1965), and *Research Designing Service, Inc.*, 141 N.L.R.B. 211, 216-17 (1963), the Board did not state that the refusal of an invalid offer would toll backpay or waive reinstatement, but rather held that the rejection of offers that appeared valid, at least to the offeree, could nonetheless reveal an unequivocal resolve not to accept reinstatement. Under such circumstances, where the employee was not aware of any improper conditions attached to the offer, it cannot be said that she was not put to a true test, and consequently, that her rejection was not unequivocal on that basis alone. In *Research Designing* the

Board also observed that the employees involved had rejected their offers for other reasons, but this observation was apparently intended to show that the employees were unaware of the improper conditions attached to the offer; it was not an inquiry into their reasons for rejecting an invalid offer. Only in *L. Ronney & Sons Furniture Mfg. Co.*, 97 N.L.R.B. 891, 892 (1951), *enforced,* 206 F.2d 730 (9th Cir. 1953), did the Board hold that an employee's failure to respond to a conditional offer, coupled with a comment that she preferred her new job, constituted a waiver of reinstatement and backpay. The Board there held that since the employee did not object to the unlawful condition attached to the offer, "It thus appears she would not have accepted the Respondent's offer, even had it been unconditional." *L Ronney* was not followed by the Board in *Atlantic Maintenance Co.,* although the dissent in *Atlantic* argued that it controlled. *Atlantic Maintenance Co.,* 134 N.L.R.B. 1328, 1329 n.1 (1961), *enforced,* 305 F.2d 604 (3d Cir. 1962).

In a strong dissent from the majority decision of the Board here, member Hunter concluded that the award of backpay for the Younces should have been tolled as of November 11, 1976 when, he concluded, they voluntarily rejected employment with the respondent:

> In view of the Younces' clear and unequivocal rejection of employment, in my opinion, it is not necessary to determine whether the Board agent, on behalf of the Respondent, communicated a proper reinstatement offer, an inquiry pursued by the judge. Rather, I believe, it is sufficient that the record clearly shows that Susan Younce had been apprised of what reinstatement meant before she gave the rejection to the Respondent. Contrary to my colleagues in the majority, I would not require an employer in this situation to simply extend a futile offer of reinstatement literally only 'for the record.'

Seligman & Assoc., Inc., 273 N.L.R.B. at 1218.

There is certainly substantial evidence to indicate that Susan Younce was knowledgeable about her rights and that she did not want her job back. We need not decide what might have been our position on review had the dissent of Board member Hunter been the view of the majority. Likewise, we need not speculate as to what might have been our decision had we been the finders of fact. The Board majority found that "based on [Susan] Younce's credible testimony, ... the circumstances of the 11 November meeting between Younce and Alterman were such that she did not voluntarily renounce reinstatement." The Board credited her testimony that she had gone to see respondent's attorney, Alterman, under the threat of immediate eviction from the parties' apartment, which was a direct consequence of the company's discrimination against her. She also stated that she felt intimidated by Alterman's demand at the meeting that she sign a letter and affidavit withdrawing the unfair labor charge if she wished to obtain a lease. The Board majority further credited Mrs. Younce's testimony that she felt so pressured and nervous that she did not know what she was doing, and that she just wanted to "get out of there." *Id.* at 1217.

Since the offer of reinstatement was conditional and was not for the Younces' former position, and further since there is no proof whatever that the same job was not available, we conclude that substantial evidence supports the Board's findings that Susan Younce's conduct at that period did not amount to a waiver of the parites' right to reinstatement.

We do not find this holding to be inconsistent with the D.C. Circuit's ruling in *Consolidated Freightways v. NLRB,* 669 F.2d 790, for the Board thoroughly discussed the circumstances surrounding the Younces' refusal of the conditional offer and the reasons why it determined that the Younces' refusal was equivocal. It has thus performed the task that in *Consolidated Freightways* it had been directed to undertake. The reasoning of the dissent may have more appeal for some, but this affords no basis for us to intrude upon the Board's authority and expertise.

Finally, the respondent contends that the Younces failed to make reasonable efforts to find new and substantially equivalent employment. Seligman argues that the Younces' refusal of employment at the Utica complex constituted a rejection of equivalent employment and consequently shows their willful loss of earnings. Seligman also argues that the Younces failed to make a diligent search for employment, noting that they did not always buy a newspaper and citing Susan Younce's testimony that they did not specifically focus on apartment complex manager or caretaker jobs in the Detroit area. Seligman also contends that the Younces' relocation to northern Michigan and then to Wisconsin, combined with automobile problems and the need for child care, unnecessarily complicated the search for a job.

The Board adopted the ALJ's findings and conclusions:

> [T]he record indicates through the backpay specification and additional testimony that following their unlawful discharges the Younces obtained employment with approximately 20 different employers between them and unsuccessfully sought employment with many others. The record reflects no willful loss of employment with regard to these jobs. Inasmuch as the law requires only a reasonable effort to find employment, I find that the record reflects that the Younces met that burden during the period following their discharge by Respondent.

ALJ op. at 9 (Joint Appendix at 87).

In *NLRB v. Westin Hotel,* 758 F.2d 1126 (6th Cir. 1985), our court summarized the well-established law governing the defense of willful loss of earnings:

> The Board's exercise of its discretion in formulating backpay awards is subject to a limited amount of scrutiny by the judiciary.... In addition, it is beyond peradventure that the defense of willful loss of

> earnings is an affirmative defense, with the burden of proof resting upon the employer....
>
> Further, a wrongfully-discharged employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the plaintiff be successful in mitigating the damage.... The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual's background and experience and the relevant job market....
>
> Finally, it must be remembered that the Board's conclusion as to whether an employer's asserted defenses against liability have been successfully established will be overturned on appeal only if the record, considered in its entirety, does not disclose substantial evidence to support the Board's findings....
>
> The general rule in labor cases is that "an employee must at least make reasonable efforts to find new employment which is substantially equivalent to the position [lost] ... and is suitable to a person of his background and experience"....

Id. at 1129-30 (citations omitted).

The Board relies heavily upon our decision in *Westin Hotel* as justifying its refusal to accept Seligman's contention that the Younces failed to search diligently for comparable employment. While as we stressed in *Westin* above, the defense of willful loss of earnings is an affirmative defense with the burden of proof resting upon the employer, we conclude that unlike the employer in *Westin,* Seligman here succeeded in establishing by competent unchallenged proof that the Younces had deliberately refused to seek comparable and equivalent employment opportunities and that such work was in fact

available at all relevant times. Further, we find in the record no reasonable basis for their failure to pursue those opportunities, which is sufficient to impose the resulting loss upon the defending employer.

It should at the outset be plainly understood that the Younces cannot be charged with failure to mitigate their damages simply because they refused the offer of alternative employment at respondent's Utica Green apartment complex located some 30 to 50 miles from the Eureka Apartments at which they had worked. To hold that they were bound to accept such alternative employment from the former employer when their original position still remained open would effectively negate the legal requirement that the employer comply with the order of reinstatement previously entered. At the same time, in our view, no excuse exists for the employees' refusal to seek other comparable employment in the vicinity when there is undisputed proof that such employment existed. It was error for the Board to have refused to take such evidence into account given its undisputed nature.

While we have that Susan Younce's testimony concerning her November 11 conversation with Seligman's attorney was not sufficient to constitute a waiver of a reinstatement offer, we nevertheless think it is entirely appropriate to consider the circumstances in their entirety and in connection with the remaining testimony of the parties and other evidence concerning the Younces' subsequent efforts to find other employment generally.

The settled law concerning a discriminatee's duty to mitigate damages by seeking other employment, and the burden placed upon the employer to make an affirmative showing of such failure before its liability for backpay can terminate is chronicled in an exhaustive opinion of the D.C. Circuit, *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307 (D.C. Cir. 1972). As the cases cited therein at pages 1317-21 make plain, to be entitled to backpay, an employee must make "reasonable efforts to find new employment which is substantially

equivalent to the position from which he was discharged, and is suitable to a person of his background and experience." *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769, 773 (1956), *enforcement denied*, 242 F.2d 697 (6th Cir.) (discharged employee must make efforts to find other employment even if not substantially equivalent), *cert. denied*, 355 U.S. 821 (1957). *See also NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966), cited favorably by our circuit in *NLRB v. Robert Haws Co.*, 403 F.2d 979, 981 (1968), and by the D.C. Circuit in *NLRB v. Madison Courier, Inc.*, 472 F.2d at 1318. Our circuit's holding in *Westin*, 758 F.2d 1126, did not disturb that rule. There we recognized that "a wrongfully-discharged employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the plantiff be successful in mitigating the damage." The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual's background and experience and the relevant job market. *Id.* at 1130 (citations omitted). As the recited facts in *Westin* demonstrate, the employee there did in fact search for substantially equivalent employment in the Detroit area. She sought employment in a number of positions within a ten-mile radius of her home, and the Board credited her testimony that she did not seek further employment at a hotel cocktail lounge of comparable quality to that of the Westin because of her previous job-seeking experience and because she was apprehensive of being refused employment until she was first cleared of any charge of wrongdoing in connection with her discharge by Westin. No similar circumstances are found in the record here. On the contrary, the employer had, immediately upon conferring with its lawyer, concluded that the Younces had been wrongfully terminated. There was nothing to indicate that the Younces' background and experience did not fully qualify them for employment comparable to their former position with Seligman. The undisputed proof showed that there were ample similar employment opportunities in the Detroit area.

In support of its assertion that the Younces willfully failed to mitigate damages, Seligman presented the testimony of Brian Holland, which was received without objection and without cross-examination. Holland testified that he had gone both to the Macomb County Community Library and the Farmington Hills Library, and there examined microfilms of *The Detroit News, The Detroit Free Press,* and other papers in search of the classified ads in those papers since 1976 or 1977, and in consequence he had prepared Respondent's Exhibit No. 6, which was thereafter received into evidence without objection. This evidence included photostatic copies of microfilms of the classified ads of *The Detroit News* and *The Detroit Free Press* starting in November, 1976, and running to March, 1983. The witness testified that he had sought to obtain at least one ad for each month demonstrating employment opportunities available to caretaker couples. He testified that there were "10 to 20, 5, 3" in some editions. He further testified that the classified ads offered the same or similar employment to the claimants' former position at Eureka. While the particular exhibit has not been included among the materials before us, it is plain from the record that those exhibits were carefully examined, and after simply verifying the source of the records, the Board's attorney, Mr. Ciaramitaro, agreed to their admission. Seligman's attorney then asked the witness, "Do I understand that without reading them all into evidence, it would be a fair statement to say that in each of these editions there are ads seeking to employ caretaker couples?" The witness answered in the affirmative, and the identified exhibit was then received by the judge into evidence. In addition to the extensive evidence relied upon by dissenting Board member Hunter in which the Younces appeared to have notified the Board agent that they did not want to work for Seligman anymore, the employees testified extensively to their activities thereafter in seeking employment. The following testimony of Susan Younce, taken from the record, is undisputed:

Q: Did you look in the newspaper for an ad?

A: Sure, we've looked in the paper all the time for jobs.

Q: Did you look for any apartment complex manager jobs?

A: No. I didn't want to get involved in that.

Q: So would it be fair to say that you never tried to get a job, you and your husband, as an apartment couple after you left Eureka?

A: For a while I would say.

Q: You just testified you didn't want to get in.

A: I didn't want to get involved in that again.

Q: So you didn't look for that type of job again, did you?

A: Not in Michigan. In Wisconsin I did.

Q: Would it be fair to say that while you were in Michigan after you left Eureka until the time you got to Wisconsin, you never looked for a job as a caretaker couple like you had at Eureka?

A: Right.

*****

According the the Younces' testimony then, they never looked for a job as a caretaker couple from the time of their discharge until the time they got to Wisconsin, approximately four years after their unlawful termination on October 7, 1976. This testimony was reiterated in Susan Younce's later testimony:

Q: Now, let me ask you a question: Do I understand it clearly that you and your husband did not look for a caretaker couple job from the time you left Eureka

until the time you went to Wisconsin? Is that a fair statement?

A: It is fair to the best of my knowledge.

Q: Well, you didn't look for one, did you?

A: Not that I can remember, no.

*****

And yet later:

Q: . . . One thing is certain, you and your husband since you left Eureka never made an application as a caretaker couple at another apartment complex?

A: Not to my knowledge.

Q: To your knowledge, did you examine some of the ads in the newspaper after you left Eureka?

A: Did I look in the ads for jobs?

Q: Yes.

A: Yes, we've done that quite a bit.

Q: Did you ever see ads for caretaker couples that were in the newspaper at the time from the time you left Eureka?

A: I don't remember. I really don't.

Q: If they were there, you would have ignored them anyway? You didn't want to work in a complex?

A: How can you say that?

Q: You tell me.

A: I'm not saying I would have refused a job. I'm just saying I was not looking for a job as a caretaker couple.

Q: You did not look for a job as a caretaker?

A: No, I wasn't out searching for a job as a caretaker.

Q: So as a matter of fact, if there were ads in the paper, you wouldn't even have looked at those ads, would you?

A: Sure. I look at all kinds of ads.

Q: I mean for a caretaker couple.

A: Specifically just go through all the papers and see if there's any caretaker jobs, no. I didn't do that.

Q: You didn't look for a caretaker couple because you weren't interested in taking that kind of work any more. Isn't that true?

A: Sure.

In *Westin* it was apparent that the discharged employee did in fact seek comparable employment, and the only question was whether her failure to seek it in particular places would show a willful failure. We held to the contrary and recognized, as we do even now, the broad range of discretion accorded the Board in determining this issue. It is true that the Younces testified as to numerous jobs which they did take from time to time as they traveled throughout Michigan and Wisconsin, and it is also true that the administrative law judge credited earnings accumulated in that period against backpay otherwise due. We do not believe, however, that on the proofs before us, David and Susan

Younce's refusal to seek comparable and substantially equivalent employment when it was so clearly available can be characterized as anything other than willful. It is plain that they were seeking a substantial change in lifestyle, one which was inconsistent with continuing the type of employment from which they had been discharged. A Board policy that would compel an employer, however wrongful the employer's original conduct, to underwrite such activity indefinitely under these circumstances does not promote the purposes of the act, nor does it comport with the uniform definition of the duty to mitigate that has been employed consistently by both the Board and the several circuits which have considered the problem.

In short, we conclude that the existing award of backpay must be denied enforcement and the cause remanded to the Board for recomputation by taking into account our determination that the Younces willfully failed to seek other comparable employment in mitigation of their losses. While it would be possible for us to endeaver to determine what would have been a reasonable time for the Younces to wait after rejecting the offer of alternative employment made by Seligman, *see, e.g.*, dissent of Judge Wellford in *Westin,* 758 F.2d at 1132, we are of the opinion that judgment should be in the first instance exercised by the Board but in conformity with our determinations here.

THE NOTICES

With respect to the posting of notices, Seligman indicated that the Regional Director had agreed to amend the notice and order to reflect that the respondent had offered reinstatement to all discriminatees except Susan and David Younce. The Board does not refute this claim, but in its brief urges approval of the language finally settled upon by the Board, which includes the names of Seligman's other employees whose discrimination charges had been settled and who had refused unconditional offers of reinstatement. Counsel for the Board observed: "The Company has given no reason, however, why it should not inform its employees of its violations of the Act, as found by the

Board and this Court, or of the remedies given for those violations. Rather, such notice would serve the statutory purpose of assuring all of the Company's employees' of an unhampered right in the future to determine their own labor affiliations' (*NLRB v. Falk Corp.*, 308 U.S. 453, 462-463 (1940)), and accordingly the notice posting requirement is well within the Board's broad remedial discretion." Brief for the NLRB at 41 n.20.

We agree with the Board that it has wide discretion in determining the language and scope of appropriate notices to be posted. We therefore enforce the posting requirements of the Board's order, but with the understanding that the Board retains its discretion to amend the notice in the manner agreed upon by the Regional Director.

Enforcement is granted in part, denied in part, and the cause remanded to the Board for further proceedings consistent with this opinion.

273 NLRB No. 153

D—2528
Southfield, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SELIGMAN & ASSOCIATES, INC.
AND ITS WHOLLY OWNED DIVISION,
SCOTT MANAGEMENT COMPANY

and

LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO Cases 7—CA—13576
7—CA—13752 (1—4)
7—CA—14086

DAVID YOUNCE, an Individual Case 7—CA—13948

SUPPLEMENTAL DECISION AND ORDER

On 29 December 1983 Administrative Law Judge William F. Jacobs issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[2] in light

[1]The Board's original Decision and Order is reported at 240 NLRB 110 (1979), enfd. 639 F.2d 307 (6th Cir. 1981).

[2]We shall grant the Respondent's motion to reopen the record and admit into evidence, only for purposes relating to the issue of whether the reinstatement offer communicated by Board agent Whiteman was hypothetical in nature, copies of Whiteman's notes of phone conversations he had with the Respondent's attorney and with discriminatee Susan Younce and an internal memorandum that he wrote concerning the case.

Inasmuch as we have limited the admission of Whiteman's notes and memorandum to the issue of the reinstatement offer's nature, we shall deny the General Counsel's motion to reopen the record to introduce into evidence the affidavit of counsel for the General Counsel.

of the exceptions and brief and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

A principal issue presented here is whether the Respondent made and discriminatees David and Susan Younce rejected a valid reinstatement offer, thereby tolling the Respondent's backpay obligation. Contrary to our dissenting colleague, we agree with the judge's finding that the Younces never unequivocally refused a valid offer.

Prior to their unlawful termination on 7 October 1976,[5] Susan and David Younce were employed as caretakers for the Eureka apartment complex managed by the Respondent. On 26 October the Younces received notice to quit the apartment that the Respondent had provided for them rent free. Two days later, Susan Younce filed an unfair labor practice charge against the Respondent.

Irwin Alterman, the Respondent's attorney, investigated the Younce allegations, concluded that they were meritorious, and

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[3]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We deny the Respondent's requests for oral argument because the record is sufficient to determine all issues presented.

[4]The judge found that the Respondent owed discriminatee Goold $1,860.50 in backpay to cover medical bills resulting from a work-connected injury. The record indicates, however, that Goold has failed to pay his medical bills. Under these circumstances, paying Goold for his medical expenses would constitute a windfall. We shall order instead that the Respondent reimburse directly BiCounty Hospital, Warren, Michigan, and Doctor John Barkay for medical services rendered Goold, thereby placing the parties in the same economic positions they would have been in had the Respondent not unlawfully discharged Goold.

We also adopt the judge's recommendation, made in resonse to the Resondent's motion, that an amended notice be substituted for the Board's original notice. The Respondent has apparently not yet complied with the notice requirements of the Board's original Order.

[5]All dates hereafter refer to 1976.

recommended immediate settlement to the Respondent. Alterman and his client agreed to a settlement proposal for full backpay and reinstatement of the Younces to caretaker positions at a complex other than at the Eureka apartments. On the afternoon of 8 November, Alterman asked Board agent Whiteman to relay to the Younces the Respondent's offer of reinstatement with backpay to a caretaker's job at the Respondent's Utica Green apartment complex, which was located 30 - 50 miles away from the Eureka complex. Whiteman then phoned Susan Younce and, according to Younce's credited testimony,[6] asked her, "If Mr. Seligman offered you your job back with backpay would you take it?" Younce replied, "No, I don't want to work there anymore. I don't even want to be around here anymore." Whiteman informed Alterman that the Younces did not want their jobs back. The Younces also apparently received a note from the Respondent asking them to report to work at the Utica Green apartment complex. They did not respond.

Meanwhile, on about the 5th or 6th of November, Susan Younce called the Respondent and asked Scott Seligman, son of the Respondent's owner, if it would be possible for her and her family to obtain a lease and remain in the apartment. Seligman replied that there would not be any problem, but she would first have to drop the unfair labor practice charges against the Respondent. On the morning of 8 November, Susan Younce called Whiteman and told him she wanted to withdraw the charge. Whiteman advised against her doing so, but stated that, if she still wished to withdraw the charge, she would have to do

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[6]The documents introduced into evidence pursuant to the Respondent's motion to reopen the record do not warrant reversing the judge's credibility finding that Whiteman made only a hypothetical offer of reinstatement. The same reasons stated by the judge for crediting Younce's testimony over prior affidavits apply to crediting that testimony over Whiteman's cursory notes and memorandum. In any event, Whiteman's notes, if credited, do not indicate rejection of the offer, but instead indicate that he communicated and Younce accepted the invalid offer to reinstate the discriminatees to another apartment complex.

it in writing. She then informed the Respondent of her conversation with Whiteman and was told to contact Alterman.

On 10 November the Younces received an eviction notice. The next day, Susan Younce went to Alterman's office. The meeting started with Younce and Alterman discussing her conversations with Seligman about dropping the unfair labor practice charge in order to obtain a lease and to remain in the apartment with her family. Alterman then explained that she would have to give an affidavit about her attempts to drop the charge. He also offered to write a letter for her to the Board withdrawing the charge. Younce agreed to Alterman's requests and, at some point during the meeting, she informed Alterman that she and her husband did not want to be reinstated. Alterman composed the affidavit and the letter stating that Younce wished to withdraw the charge and had no desire to be reinstated. After reading over and making changes in the affidavit and letter, Younce signed both of them. She withdrew her charges with the Board, but a complaint later issued against the Respondent after her husband filed a charge.

The judge found that the Respondent did not make such a firm, unconditional offer of reinstatement sufficiently unequivocal as to toll backpay. He based this conclusion on the facts that: (1) the reinstatement offer received by Susan Younce from Board agent Whiteman was hypothetical, and therefore did not provide her with the opportunity to make a considered choice whether to accept reinstatement;[7] (2) the Younces were offered similar but not equivalent jobs at the Respondent's Utica Green apartment complex, not the Eureka complex where they had worked prior to their unlawful discharge, and such offers of work at a different location and for different management are not sufficient to toll backpay;[8] and (3) the Respondent, by electing to convey its reinstatement offer through a Board agent instead of proffering it directly, is bound by any resulting confusion.[9]

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[7] *Dobbs Houses*, 182 NLRB 675 (1970).

[8] *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964).

[9] *Rafaire Refrigeration Corp.*, 207 NLRB 523 (1973).

We agree with the judge's findings for the reasons set forth in his decision. Because there is no credible evidence that the Respondent ever made a legitimate reinstatement offer to the Younces, it has failed to toll its backpay obligation. It is well settled that only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled.[10]

Our dissenting colleague does not contend that the Younces ever received a valid reinstatement offer. Instead, he would depart from clear Board precedent by holding that Susan Younce's renunciation of intent to seek reinstatement or backpay in her 11 November meeting with Alterman waived the Respondent's obligation ever to make a reinstatement offer. We see no reason to make such a change in the law. As a wrongdoer, the Respondent bears the burden of remedying its unfair labor practices.[11] We impose no hardship by requiring that it meet that burden by making a clear, unequivocal, legitimate reinstatement offer even in the face of a discriminatee's apparent understanding and repudiation of the concept of reinstatement.

Moreover, we find, based on Younce's credible testimony, that the circumstances of the 11 November meeting between Younce and Alterman were such that she did not voluntarily renounce reinstatement. Younce went to Alterman under threat of immediate eviction from her apartment, a direct consequence of the Respondent's discrimination against her.[12] It is clear that

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[10] *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980).

[11] See *Electrical Workers IUE v. NLRB*, 426 F.2d 1243, 1251-52 (D.C. Cir. 1970).

[12] The dissent treats this encounter as a benign, business-like affair, arranged for "Younce's own purposes, i.e., to withdraw the charge and to obtain a lease." Indeed, Younce did desire a lease; otherwise, she and her family faced immediate eviction from the apartment house which they had occupied as a term and condition of the Respondent's employment. Simply put, Younce would not have needed a lease if the Respondent had not unlawfully discharged her. As the law of this case, the discharge was coercive. It is fallacious to suggest that the meeting to obtain a lease as a direct consequence of such coercion was itself devoid of coercion.

Younce was intimidated by Alterman's demand at the meeting *that she sign a letter and* affidavit withdrawing the unfair labor practice charge if she wished to obtain a lease. Indeed, Younce credibly testified that she felt so pressured and nervous that she did not know what she was doing and that she just wanted to "get out of there." Accordingly, inasmuch as Younce's statement that she did not want to be reinstated was made under coercive circumstances, we find that it was not binding.

Inasmuch as the Respondent failed to proffer a specific offer of reinstatement at the same location to the Younces and the Younces did not voluntarily reject such a proper offer, we find that the Respondent's backpay obligations to the Younces have not been tolled.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Seligman & Associates, Inc. and its wholly owned Division, Scott Management Company, Southfield, Michigan, its officers, agents, successors, and assigns, shall pay Clarence Goold, David Younce, and Susan Younce the sums set out in the Order as modified.

1. Insert the following paragraph between the first and second paragraphs of the Order.

"The Respondent shall reimburse BiCounty Hospital, Warren, Michigan, $1200 and Doctor John Barkay $660.50 for medical services rendered Clarence Goold for injuries suffered while in the employment of the Respondent."

2. Substitute the attached notice for that of the Board in its original Decision and Order reported at 240 NLRB 110 (1979).

Dated, Washington, D.C. 14 December 1984

Don A. Zimmerman, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HUNTER, dissenting.

I disagree with my colleagues' adoption of the judge's reinstatement order and backpay findings with respect to Susan and David Younce. The judge found that the Respondent did not make a firm, unconditional offer of reinstatement to the Younces sufficient to toll backpay. On this basis, the judge found that the Younces' backpay period commenced on the date of their discharge, 7 October 1976, and is not yet over as they have never been offered reinstatement. Contrary to the judge and my colleagues, I would find that backpay for the Younces was tolled as of 11 November 1976 when they voluntarily rejected employment with the Respondent. In view of the Younces' clear and unequivocal rejection of employment, in my opinion, it is not necessary to determine whether the Board agent, on behalf of the Respondent, communicated a proper reinstatement offer, an inquiry pursued by the judge. Rather, I believe, it is sufficient that the record clearly shows that Susan Younce had been apprised of what reinstatement meant before she gave the rejection to the Respondent. Contrary to my colleagues in the majority, I would not require an employer in this situation to simply extend a futile offer of reinstatement literally only "for the record."

Based on uncontradicted record evidence, which the judge improperly failed to include in his factual recitation, I would find that Susan Younce, on behalf of herself and her husband, rejected employment and tolled backpay as of 11 November 1976. The record clearly shows that both Susan Younce and the Respondent's attorney Alterman testified that, in their meeting held on 11 November 1976, Susan Younce voluntarily said that she did not want her job back. Since the Younces were hired and fired as a caretaker couple, I would find that Susan Younce's rejection included her husband's job. It is obvious that Susan Younce knew the import of her rejection. In her conversation with Board agent Whiteman on 8 November 1976, Susan Younce was given an adequate explanation as to what reinstatement entailed. As shown by the record, it was in this conversation that Susan Younce first announced that she and

her husband did not want their jobs. Thus, I would permit the Respondent to rely on Susan Younce's rejection of employment for her and her husband. I find this result is further supported by the fact that the Respondent had outstanding a reinstatement offer to the Younces which the Board agent had said was communicated to and rejected by Susan Younce.

My colleagues in the majority claim that Younce's unsolicited refusal of employment with the Respondent communicated to the Respondent's attorney was made under "coercive circumstances" and, thus, should not be held binding on the Younces. I disagree. As far as the record shows, the meeting with the Respondent's attorney was conducted in accord with Younce's own purposes, i.e., to withdraw the charge and to obtain a lease. The impetus for the meeting had been Younce's own desire to obtain a lease and withdraw the pending charge. Younce apparently was experiencing difficulty withdrawing her charge on her own. Without disputing these facts, the majority has adopted a per se definition of coercion. In the majority's view, this meeting with Susan Younce automatically was coercive simply because one of the subjects discussed was a benefit lost as a result of the Younces' discharge, i.e., the use of a townhouse at the complex where the Younces worked. Under the majority's definition of coercion, any meeting between an employee and his employer to discuss the effects of an unlawful discharge, including settlement conferences between an employee and his employer to discuss any wages, benefits, or privileges lost through an unlawful discharge, is coercive irrespective of the factual circumstances surrounding such meetings. I cannot accept such a far-reaching approach.

I point out that Younce's rejection of employment was not a quick reaction on her part. The record shows that she had arrived at this decision several days earlier and had first communicated her decision in the conversation with Board agent Whiteman. Younce's own testimony indicates that she was not "coerced" by Whiteman to reject employment; rather, to the contrary, it appears that Whiteman strongly tried to pursuade her to accept employment or at least a backpay settlement but was unsuccessful in his efforts.

I also cannot agree with the majority opinion's handling of Goold's medical expenses. The judge recommended that the Respondent be ordered to pay Goold directly for his medical bills which would have been covered by the Respondent's insurance plan but for Goold's unlawful discharge. However, to date Goold has not been required to pay these medical bills which were incurred in 1976 and 1977. The Respondent has only excepted to the direct payment to Goold for these medical expenses. Due to the age of these bills, the Respondent claims that collection may be barred by the applicable state statute of limitations and Goold may never be liable for these expenses. To meet this concern, the majority orders the Respondent to directly pay the health care prooviders who rendered the medical services. I cannot accept my colleagues' approach as sufficient in these circumstances. Instead, I would only order the Respondent to indemnify Goold if any collection action on these bills is instituted. In this way, the Respondent is permitted to pursue its available defenses to a collection action and Goold is held harmless. This kind of remedy, in my view, is more consistent with the aim of the Board's remedial powers to make the discriminatee whole for his out-of-pocket expenses.

For all the reasons stated above, I therefore dissent.

Dated, Washington, D.C. 14 December 1984

Robert P. Hunter, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interfere with our employees' rights under Section 7 of the National Labor Relations Act, or discourage membership in Local 79, Service Employees International Union, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against our employees in regard to hire or tenure of employment or any other term or condition of employment.

WE WILL NOT coercively interrogate or threaten our employees, or prohibit them from talking to new employees aobut the Union.

WE WILL NOT transfer, promote, or reclassify our employees in an attempt to gerrymander the unit in an NLRB election.

WE WILL NOT threaten to discharge our employees for testifying at an NLRB hearing.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer David Younce and Susan Younce full, immediate, and unconditional reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed; and WE WILL make them whole for any loss of pay suffered by reason of the discrimination against them, with interest.

WE WILL reimburse BiCounty Hospital and Doctor John Barkay for medical services rendered Clarence Goold as a result of a work-connected accident.

WE HAVE made Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson whole for any loss of pay suffered by reason of the discrimination against them, in accordance with the settlement agreement entered into by the parties at the backpay hearing in the instant proceeding.

WE HAVE made unconditional offers of reinstatement to Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson and these offers have been refused.

SELIGMAN & ASSOCIATES, INC.
AND ITS WHOLLY OWNED DIVISION,
SCOTT MANAGEMENT COMPANY

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone 313-226-3244.

JD-556-83
Detroit, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SELIGMAN & ASSOCIATES, INC.
AND ITS WHOLLY OWNED DIVISION,
SCOTT MANAGEMENT COMPANY

and

LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Case Nos. 7-CA-13576
7-CA-13752 (1-4)
7-CA-13948
7-CA-14086

DAVID YOUNCE, An Individual

John Ciaramitaro and Joseph P. Canfield, Esqs., of Detroit, MI, for the General Counsel.

J. Leonard Hyman and Irwin Alterman, Esqs. (Hyman, Gurwin, Nachman, Friedman and Winkelman), of Southfield, MI, for Respondent.

SUPPLEMENTAL DECISION

WILLIAM F. JACOBS, Administrative Law Judge: This is a supplemental proceeding to determine the amount of medical compensation due Clarence Goold and the amount of backpay due David and Susan May Younce, who were found to be discriminatees, unlawfully terminated by Respondent, in a previously held unfair labor practice hearing.[1] The instant proceeding was held before me on June 6, 7, 9 and 10, 1983 at

[1]The Order of the Board pursuant to which this hearing was held is dated January 24, 1979 (240 NLRB 110), enfd. (C.A. 6), January 21, 1981, 106 LRRM 2413; cert. denied Oct. 5, 1981.

Detroit, Michigan based on the amended backpay specification which issued April 26, 1983 and Respondent's answer filed May 2, 1983. All parties were afforded opportunity to participate in the hearing, to present evidence, examine witnesses and to argue orally. Briefs were filed by the parties.

Upon the entire record in this case including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I hereby make the following:

Findings of Fact

The Issues

1. Whether Clarence Goold should be compensated for the medical expenses he incurred as a result of an accident in which he was involved while an employee of Respondent, and if so in what amounts.

2. Whether David and Susan May Younce should receive backpay and if so how much. The subissues are:[2]

(a) Whether David and Susan Younce received and rejected a proper reinstatement offer when Seligman's counsel made the offer through Board agent Whiteman.

(b) Whether the Younces are estopped from seeking backpay.

(c) Whether the amounts due the Younces, as reflected by the backpay specification, are correct.

(d) Whether the notice to employees which the Board has ordered posted should be revised to delete reference to reinstatement and backpay.

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[2]These are also the issues raised in Respondent's brief.

1. Clarence Goold

Clarence Goold, while employed by Respondent, was involved in an automobile accident on December 19, 1976. At the time of the accident he was engaged in the performance of work-connected duties. As a result of the accident Goold suffered injuries which required medical attention and hospitalization as well as attendant expenses. The total expenses incurred were $1860.50, $1200 of which was attributable to hospitalization which was undergone in April 1977, the rest of which were doctor bills for office visits between December 22, 1976 and August 11, 1977; physiotherapy undergone during the same period; injections, oral medication and other tests, all accident connected, according to the credited testimony of Goold, supported by a doctor bill presented at the hearing by Goold. No bill was presented for the $1200 hospitalization[3] which Goold credibly testified he had undergone in April 1977.

Goold credibly testified that while he and his wife were employed as a caretaker couple by Respondent they were covered by a medical and hospitalization plan provided by Respondent and that they had received benefits under the plan in 1976 when his wife became pregnant and all maternity costs including both hospitalization and doctor bills were paid for through the plan even up to within 2 months of Goold's termination. It if General Counsel's position that but for Goold's unlawful termination the hospitalization and doctor's bills suffered as a result of his December 19 automobile accident, would have been paid by Respondent's insurance plan.

The burden is on General Counsel, in backpay cases, to show losses suffered by a discriminatee and reflect those losses in a backpay specification. The burden is on Respondent in this type

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[3]The hospitalization according to Goold was for about 10 days. The doctor bill reflects that Goold made 27 office visits: 4 in December 1976, 8 in January, 2 in February, 1 in March, none in April during which month he was hospitalized, 3 in May, 4 in June, 3 in July and 2 in August.

of case, to prove diminution of such losses whether the diminution is the result of interim earnings, failure of the discriminatee reasonably to search for interim employment, unavailability for employment or of other factors.[4]

In the instance proceeding General Counsel relies principally upon Goold's testimony and the supporting doctor's bill to prove Goold's claim. As noted above, I found Goold to be a credible witness and would rely on his testimony unless Respondent presented evidence to undermine that credibility or evidence to indicate a proper diminution of the total sum of his claim.

Respondent, in presenting its case, did not challenge Goold's testimony that prior to his discharge, he and his wife received benefits covering her pregnancy in 1976 including payment of hospitalization and doctor bills. Since his testimony on this matter went unrefuted I find that Goold was, in fact, covered by a hospitalization plan prior to his discharge.

Respondent presented only one witness to testify concerning Goold's claim. This was Mary Newkirk, Respondent's assistant controller. But Newkirk was not hired until approximately 2½ years after Goold's accident and discharge and so had no first hand information concerning the existance or nonexistance of insurance coverage for caretaker couples. Newkirk was asked, in preparation for the instant proceeding, to examine certain files to determine if they contained any reference to any 1976 insurance coverage for caretaker couples. She found none. No explanation was offered as to why Respondent did not call the member of management in charge of such matters in 1976 to testify concerning the matter, nor why one or more caretaker couples employed in 1976 were not called to testify concerning insurance coverage at the time. I find Respondent's choice of Newkirk to testify[5] and its failure to call any knowledgable witness to testify on

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[4]*Brown and Root, Inc.*, 311 F.2d 447 (1963), 327 F.2d 958 (C.A. 8, 1964); *Mastro Plastics Corporation*, 354 F.2d 170 (C.A. 2, 1965), cert. denied 384 U.S. 972 (1966); *DeLorean Cadillac, Inc.*, 231 NLRB 329.

[5]Newkirk testified as to the existence of a 1978 insurance plan covering salaried employees. I find this testimony irrelevant.

the matter was an apparent attempt to stonewall on the issue. I draw the adverse inference that if Respondent called knowledgable management witnesses to testify, their testimony would be contrary to the interest of the Respondent. I shall rely on the credible testimony of Goold[6] and find that he was covered at the time of his accident by an insurance plan paid for by Respondent and that but for his unlawful discharge, the hospitalization and doctor bills resulting from injuries sustained by him due to the accident would have been paid by Respondent.[7] Such monies due are correctly listed in General Counsel's amended backpay specification.[8]

2. Susan and David Younce

Susan and David Younce were unlawfully terminated by Respondent on October 7, 1976.[9] Before termination both received compensation for their work in the form of separate checks every 2 weeks plus the use for them and their three children of a townhouse located at the complex where they were employed. Following their termination the Younce family continued to occupy the same townhouse apartment which they had lived in while employed by Respondent.

On October 26, a notice to quit issued requiring the Younces to abandon their apartment. Two days later, Susan Younce filed the charge in Case No. 7-CA-13451 alleging the discriminatory discharge of her and her husband. Shortly after the charge was filed, Irwin Alterman, Respondent's attorney, investigated the circumstances surrounding the allegations contained in the charge and determined that they were

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[6]Counsel for Respondent did not avail himself of his right to subpoena either individuals or documents in connection with Goold's hospitalization or doctor bills though the names of the hospital and doctor who treated Goold were discussed on the record.

[7]Additional arguments as to why Respondent should not be required to pay these sums, outlined in Respondent's brief, I find to be without merit.

[8]*Sam Tanksley, Inc.*, 210 NLRB 656.

[9]Hereinafter all dates are in 1976 unless otherwise indicated.

meritorious. He advised Respondent of his findings and recommended immediate settlement to the Younces with full backpay. His client agreed. Alterman, however, suggested that the Younces be offered caretaker positions at an apartment complex other than Eureka, the one at which they had been employed and at which they had lived prior to their discharge. He did this because it was his understanding that they had been having trouble with the resident manager at Eureka. Again, Respondent's management agreed to Alterman's suggestion.

Having received the agreement of his client, Alterman contacted Board agent Whiteman, the individual assigned to handle the case for Region 7. By telephone, Alterman advised Whiteman that Respondent would offer the Younces their jobs back with full backpay, less interim earnings. Being more specific, he told Whiteman that the Younces would be offered a caretaker couples' position in one of Respondent's Utica apartment complexes. Utica is located 30-50 miles away from the Eureka complex where the Younces were living and working for Respondent prior to their unlawful discharge. Alterman requested that Whiteman communicate the offer to the Younces.[10] Whiteman agreed to do so.

Following[11] the discussion between Alterman and Whiteman, a telephone conversation took place between Susan Younce and Whiteman during which Whiteman asked Younce a question concerning possible reinstatement. According to the credited testimony of Younce,[12] Whiteman asked her, "If Mr. Seligman offered you your job back with backpay, would you take it?" Younce replied, "No, I don't want to work there anymore. I don't even want to be around here anymore." Whiteman

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[10]On November 9 Alterman forwarded to Whiteman a confirming letter in which he offered reinstatement to Susan Younce to a job in Utica with backpay. Although Susan Younce was specifically named in this letter in two places, David Younce was not so named. Nor were "the Younces" named as such. The letter clearly indicates an offer to reinstate only Susan.

[11]The date is not clear from the record.

[12]Whiteman did not testify.

rejoined, "You know you could get your backpay without taking your job back," and Younce simply said, "Fine!" Sometime after this discussion, Whiteman called Alterman and advised him that the Younces did not want their jobs back.

Meanwhile, about the 5th or 6th of November, Susan Younce, having received the notice to quit, and her husband and three children being sick with the flu, decided to contact Respondent directly. She called Scott Seligman, son of Respondent's owner, and told him of the illness in her family. She asked him if it would be possible for her and her family to obtain a lease and remain in the apartment, to get the apartment fixed up and to stay there as rent paying tenants. Seligman replied that there would be no problem granting her request but that she would first have to drop the unfair labor practice charges which she had filed against Respondent.[13]

About November 8, Susan Younce called Whiteman and told him that she wanted to withdraw the charges. Whiteman advised her against doing so because she had a strong case. Susan explained to Whiteman that all she wanted to do was get a lease for her apartment and that Seligman had told her that if she dropped the charges against Respondent, she could have the lease.

Whiteman stated if she wanted to withdraw the charges, she would have to do so in writing.

Following her discussion with Whiteman, Susan Younce again called Seligman and told him that she had tried to drop the charges with the Board but that Whiteman would not let her because she had too strong a case. Seligman advised her to contact the Board again and have Whiteman send her a withdrawal request form to sign. He also told her to go to Alterman's office to sign a lease for her to remain in her apartment as a rent paying tenant.

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[13]Seligman did not testify.

Subsequently, Seligman or someone from his office contacted Alterman and told him that Susan Younce was trying to drop the unfair labor practice charges but that the Board would not permit her to do so. Alterman was then asked to meet with Susan Younce and review the situation. In accordance with his client's request, Alterman made arrangements for Kathy LaFrance, the wife of Eureka's resident manager to transport Susan Younce to his office for a meeting to discuss the situation, said meeting to take place November 11.

On November 10 an eviction notice issued against David and Susan Younce and on the 11th she was driven to Alterman's office in accordance with arrangements made earlier by Alterman. Once in Alterman's office Younce and Alterman discussed the events of the previous week, particularly discussions which had taken place between herself and Whiteman concerning her desire to drop the charge and between herself and Seligman concerning her desire to obtain a lease and remain in the apartment with her sick family.[14] Following Younce's description of events, Alterman explained that he would need an affidavit from her regarding her attempts to withdraw the charge, that he needed this for his files and that it was necessary for her to supply an affidavit to enable her to obtain the lease. He then asked her if she would supply such an affidavit and she agreed to do so. Alterman then asked Younce what she intended to do about the written withdrawal request which Whiteman had demanded of her and offered to compose a letter for her. She agreed to this also, whereupon Alterman dictated both an affidavit and letter which were subsequently typed in draft by one of his clericals. When the drafts were ready they were presented to Younce for review. Alterman directed Younce to look over both documents and to point out any words which she did not ordinarily use. She pointed out several such words and these were changed. He then requested that Younce read through the letter to make sure it sounded as though she had composed it, that it was in her own

[14]Minor differences in the testimony of Younce and Alterman concerning the particulars of this meeting, I have resolved in favor of Susan Younce whom I find, on the basis of demeanor, to have been a most convincing witness.

words. She did this after which Alterman asked her if the documents were accurate. She said they were and they were then typed in final form.

Alterman then requested Younce to sign both documents. She did so and was then driven home by Kathy LaFrance.

Younce credibly testified concerning this meeting in Alterman's office, "I was supposed to go there to get a lease and instead, I got these (the affidavit[15] and withdrawal letter[16]) .... Now I'm a little bit calm about it, but when this was taking place I was nervous and upset and I don't think I was in the right [frame of] mind to really know what I was doing. I went to [Alterman's] office for a lease and I ended up having to do all this. I felt pressured in [his] office when I wrote it for one thing, and I said, 'Yes, it is okay,' and I signed it just to get out of there." On November 12 the withdrawal of the charge in Case No. 7-CA-13451 was approved. The same allegations were, however, included in a charge subsequently filed by David Younce in April 1977.

a. The Alleged Reinstatement Offer

Respondent takes the position that the above described set of circumstances reflects a legitimate offer of reinstatement to the Younces by means of the offer made by Alterman through Whiteman to Susan Younce. After reviewing the facts as described above, I find that Respondent did not make such a firm, unconditional offer of reinstatement, sufficiently unequivocal as to toll backpay. I arrive at this conclusion based on the following:

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[15]The content of the affidavit and of Younce's description of events as they pertained to the events of the previous several days differ markedly. I credit Younce's live testimony at the hearing over the content of the affidavit, primarily based on Younce's explanation of why such differences exist. The factual description of events contained in this section of the decision are based on Susan Younce's convincing and credited testimony.

[16]Where the content of Younce's live testimony differs from that of the withdrawal letter, composed by Alterman and signed by Younce, I credit Younce's live testimony.

(1) The offer received by Susan Younce from Board agent Whiteman was hypothetical in nature. It was delivered in the form of a question:

> If Mr. Seligman offered you your job back with backpay, would you take it?

The Board has held that a hypothetical offer such as this is not a sufficient offer of reinstatement so as to toll backpay because the employee must be given sufficient time to consider an offer made in positive terms.[17] Only when a proper offer is made and is unequivocally rejected by the employer is the employee relieved of his statutory duty to reinstate.[18] In the instant case, no proper offer of reinstatement was offered to the Younces and they are therefore not bound by Susan Younce's unconsidered statement that she did not "want to work there anymore" because she had not been given sufficient opportunity to manifest an unequivocal resolve not to accept reinsatement.[19]

(2) The Younces were never offered reinstatement to the positions they held at the Eureka complex from which they were unlawfully terminated. Rather, they were offered similar but not equivalent jobs at Utica, a complex 30-50 miles away. The offer of a position at a different location, working for different management is not an offer of reinstatement sufficient to warrant the tolling of backpay. An employee who has already suffered the effects of a discriminatory discharge has no duty to assume additional hardships to reduce the employer's backpay liability.[20]

(3) The Respondent chose not to deal directly with the Younces although it wrote letters directly to other

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[17] *Dobbs Houses*, 182 NLRB 675.

[18] *W. C. McQuaide, Inc.*, 239 NLRB 671, affd. 617 F.2d 349.

[19] *Dobbs, supra. Don Pizzolato, Inc.*, 249 NLRB 953; *J.E. Plastics Mfg. Corp.*, 131 NLRB 299.

[20] *M.J. McCarthy Motor Sales Co.*, 147 NLRB 605.

discriminatees offering them their jobs back. The case law holds that an employer who chooses to offer reinstatement to discriminatorily discharged employees through third parties rather than directly does so at his own risk and if such indirect communication results in confusion, it is the employer who should suffer thereby, not the innocent discriminatee. This is so for two reasons. First, because but for Respondent's discriminatory act the problem would never have arisen and secondly, but for his choice of agent, the confusion would never have arisen.[21]

I find, in short, that Respondent did not, and has not made the specific, unequivocal and unconditional offer of reinstatement necessary to toll the backpay period.[22]

b. The Estoppel Theory

Respondent argues that the Board and the Younces should be estopped from claiming that the offer made through Alterman via Whiteman to Susan Younce was invalid because Respondent acted reasonably and relied upon the Board's agent and the Younces at the time. I have found, however, that the offer which Alterman attempted to make to Susan Younce through Whiteman, i.e. employment in Utica, was not the specific, unequivocal and unconditional offer of reinstatement which is required in order to toll backpay. That being the case, the question of estoppel is not relevant and I recommend rejection of Respondent's theory for that reason.

c. The Amounts of Backpay

Respondent argues that the Younces incurred a willful loss of employment when they turned down the job at Utica which, Respondent claims, is substantially equivalent employment. I have found, however, that the job in Utica never was offered to

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[21] *Lipman Bros., Inc.*, 164 NLRB 850; *Refaire Refrigeration Corp.*, 207 NLRB 523; *W.C. McQuaide, Inc.*, 239 NLRB 671, affd. 617 F.2d 349.

[22] *L.A. Water Treatment*, 263 NLRB 244.

the Younces except hypothetically. Since the Utica job never was actually offered, I find no willful loss of earnings in connection with said hypothetical offer.

Respondent asserts further that the Younces did not search for substantially equivalent employment following their unlawful discharge. Respondent points out that the Younces had only intermittent, low paying employment following their discharge "not comparable to their former positions." This is true and if it were otherwise, if the Younces had immediately found steady, better paying jobs than they had while working for Respondent, they would not be seeking backpay through the instant process and I would not be writing this decision. However, it is Respondent who placed them in their predicament and there is no evidence in the record to show that the Younces turned down high paying jobs in favor of the lower paying employment which they accepted. On the contrary, the record indicates through the backpay specification and additional testimony that following their unlawful discharges the Younces obtained employment with approximately 20 different employers between them and unsuccessfully sought employment with many others. The record reflects no willful loss of employment with regard to these jobs. Inasmuch as the law requires only a reasonable effort to find employment, I find that the record reflects that the Younces met that burden during the period following their discharge by Respondent.

Respondent correctly points out in its brief that during the pertinent period between 1976 and 1983 there were numerous ads in the Detroit newspapers for caretaker couples but that the Younces did not avail themselves of the opportunities presented by applying for these positions. Since they did not do so, Respondent argues that they did not make a reasonable search for equivalent employment. All this is true as far as it goes. However, there is no requirement that a discriminatee consult the newspaper classified ads to seek employment. Nor is there evidence that the Younces were qualified for any of the jobs advertised, nor if qualified, would have been hired.[23]

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[23] *Amshu Associates, Inc.*, 234 NLRB 791.

Moreover, let us consider Respondent's argument in light of the particular circumstances of the instant case. The Younces participated in certain protected activities while employed by Respondent. Respondent not only unlawfully terminated them for engaging in these activities but undertook to dispossess them from their apartment as a part of the discriminatory retaliation against them. This was at a time when David Younce and the children were seriously ill. Susan Younce testified credibly that she did not look for a similar position at the time becuse she "didn't want to get involved in that." By this statement, it seems quite clear that Susan Younce meant that having been placed in the position by Respondent of being put out in the street with her family solely because she chose to engage in protected concerted activity, she was not about to make the same mistake again. I find that under the circumstances the Younces acted reasonably in seeking employment other than as a caretaker couple. Moreover, where does the Act say that once an employee is discriminatorily terminated from a particular job, that he must remain in that specific type of employment in perpetuity. Indeed he need not necessarily do so.[24] To make such a finding in the instant case would reward Respondent for its discriminatory act and punish the Younces by keeping them from exercising their freedom of choice of employment which all other individuals who are not discriminatees are free to exercise. I find that the Younces acted reasonably in searching for alternative types of employment following their unlawful discharge by Respondent.

Respondent argues that by moving out of the Detroit area Susan Younce made herself unavailable for work because she no longer had babysitters on whom she could rely while she went to work. This argument appears to beg the question since before she was unlawfully discharged she had an apartment provided

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[24]"As a general proposition, entitlement to backpay does not turn on a showing that the discharged employee sought precisely the same type of interim employment as that from which he was discharged." *Avon Convalescent Center, Inc.*, 219 NLRB 1210; reversed in pertinent part 549 F.2d 1080.

free of charge at the site of her employment so that she could both mind her children, easily find babysitters and earn a wage at the same time. Respondent is not relieved of the requirement of paying Susan Younce backpay because she did not manage to duplicate the situation *ante*. Moreover, a discriminatee is free to seek job opportunities in other areas than the one where the discriminatory discharge took place and still be entitled to backpay.[25]

Respondent argues that Susan Younce was periodically unavailable for work for medical reasons. Respondent relies on a National Labor Relations Board backpay form [26] which Susan Younce filled out in July 1981. On this form Younce noted that she left her job at Shield's Restaurant in February 1979 due to surgery and left her job at Dorchester Nursing Center for 2 months in 1981 also due to surgery. There being no testimony in the record to counter the documentary evidence offered by Respondent, proper deductions should be made for the periods of illness noted.[27]

Finally, Respondent claims that in the aforementioned form[28] Susan Younce admitted that she was not in the job market between November 1977 and May 1978 because during that period she lived nearly 20-25 miles from town, her car broke down and there was no local employment. However, case law[29] indicates that loss of interim employment due to lack of transportation through no fault of the discriminatee does not amount to a willful loss of employment and is not a basis for reducing backpay. Similarly, during certain periods of time where Susan Younce had available to her only split shift work at a great distance from her home which required a great deal of time going back

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[25] *Champa Linen Service Co.*, 222 NLRB 940; *Robert Haws Company*, 161 NLRB 299.

[26] Respondent Exh. 5, para. 17.

[27] Inasmuch as Susan Younce earned more at Shield's Restaurant in one month that she would have earned at Respondent's during the entire first quarter of 1979, backpay due for this period is unaffected by her absence due to illness.

[28] Paragraph 20.

[29] *Fort Lock Corporation*, 233 NLRB 78.

and forth and the cost of transportation and of hiring a babysitter was greater than the remuneration received for holding down that job, I find Susan Younce's decision to quit her job a reasonable one and not such as to reflect a willful loss of employment.[30] Indeed, inasmuch as she had neither transportation nor babysitting problems prior to her unlawful discharge by Respondent, I see no basis for diminishing the backpay due her to the benefit of Respondent because of personal difficulties totally ascribable to Respondent's unfair labor practices.

In short, I have found no reasonable basis for diminishing the amount of backpay due, based on Respondent's claim that the discriminatees failed to meet their obligation to seek out and hold interim employment. I do find a basis for diminishing the total amount due to the incapacitating illness of Susan Younce.

In accordance with the above reasoning I find the backpay due David and Susan Younce to be as follows:

David Younce

Calendar Quarter	Gross Backpay	Interim Earnings	Net Backpay
1976-4	$1084.87[31]	—	$1084.87
1977-1	$1174.95[32]	—	$1174.95
1977-2	$1651.92[33]	$ 215.25	$1436.67

[30] *Richard W. Kaase Company*, 162 NLRB 1320.

[31] $180.76 biweekly pay times 26 equals $4,699.76 annual wage divided by 12 equals $391.65 per month wages times $2.77 monthly period equals $1084.87 for the quarter. Since the Younces remained in their apartment throughout this period without paying rent, rental benefits are not included.

[32] $391.65 per month wages times 3 equals $1174.95 quarterly backpay.

[33] $1174.95 quarterly backpay plus $476.97 (3 times monthly apartment benefit, $158.99 equals $1651.92. The Younces were evicted in March according to the credited testimony of David Younce.

Calendar Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977-3	$1651.92	—	$1651.92
1977-4	$1651.92	—	$1651.92
1978-1	$1651.92	—	$1651.92
1978-2	$1651.92	$1726.00	—
1978-3	$1651.92	$1726.00	—
1978-4	$1651.92	$ 350.00	$1301.92
1979-1	$1651.92	—	$1651.92
1979-2	$1651.92	$ 400.00	$1251.92
1979-3	$1651.92	—	$1651.92
1979-4	$1651.92	—	$1651.92
1980-1	$1651.92	—	$1651.92
1980-2	$1651.92	—	$1651-92
1980-3	$1651.92	$ 539.16	$1112.76
1980-4	$1651.92	$2767.36	—
1981-1	$1651.92	$3949.00	—
1981-2	$1651.92	$3949.00	—
1981-3	$1651.92	$3949.00	—
1981-4	$1651.92	$3949.00	—
1982-1	$1651.92	$4051.32	—
1982-2	$1651.92	$4051.32	—
1982-3	$1651.92	$4051.32	—
1982-4	$1651.92	$ 934.92	$ 717.00
1983-1	$1651.92	—	$1651.92
TOTAL			$22,947.37[34]

[34]Total net backpay due David Younce as of the end of the first quarter 1983. Backpay continues to run thereafter inasmuch as no proper offer of reinstatement has been made by Respondent to David Younce.

Susan Younce

Calendar Quarter	Gross Backpay	Interim Earnings	Net Backpay
1976-4	$ 300.07[35]	$ 24.20	$ 275.87
1977-1	$ 324.99	$ 510.75	—
1977-2	$ 324.99	—	$ 324.99
1977-3	$ 324.99	—	$ 324.99
1977-4	$ 324.99[36]	$ 18.23	$ 306.76
1978-1	$ 324.99[37]	$ 33.93	$ 291.06
1978-2	$ 324.99[38]	—	$ 324.99
1978-3	$ 324.99	—	$ 324.99
1978-4	$ 324.99	$ 72.87	$ 252.12
1979-1	$ 324.99	$ 434.54	—
1979-2	$ 324.99	$1140.86	—
1979-3	$ 324.99	$1711.29	—
1979-4	$ 324.99	$1711.29	—
1980-1	$ 324.99	—	$ 324.99
1980-2	$ 324.99	$ 516.46	—
1980-3	$ 324.99	—	$ 324.99
1980-4	$ 324.99	$ 164.31	$ 160.68
1981-1	$ 324.99	$ 532.80	—
1981-2	$ 108.33[39]	$ 34.13	$ 74.20
1981-3	$ 324.99	$ 543.95	—

[35]$108.33 monthly pay times $2.77 months.

[36]Contrary to Respondent's position, I find, for reasons stated *supra*, that Susan Younce did not sustain a willful loss of interim employment during this period.

[37]*Ibid.*

[38]*Ibid.*

[39]Two months out of work due to surgery.

Calendar Quarter	Gross Backpay	Interim Earnings	Net Backpay
1981-4	$ 324.99	$ 371.46	—
1982-1	$ 324.99	—	$ 324.99
1982-2	$ 324.99	$ 888.73	—
1982-3	$ 324.99	—	$ 324.99
1982-4	$ 324.99	—	$ 324.99
1983-1	$ 324.99	—	$ 324.99
TOTAL			$4,610.59[40]

d. The Notice

Inasmuch as I have found that Respondent never made a proper offer of reinstatement to David or Susan Younce, its motion to revise the notice is denied with respect to these two discriminatees. With respect to Respondent's motion to revise the notice with regard to the offer of reinstatement to Clarence Goold,[41] Larry Davis, Rickey Davis, Charles Davis, Mark Rushing, Harold Dodson and Madeline Dodson, the motion is granted to the extent reflected in the notice attached hereto.[42]

On the basis of the foregoing findings of fact and upon the entire record in this case, I hereby issue the following recommended:[43]

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[40]Total net backpay due Susan Younce as of the end of the first quarter 1983. Backpay continues to run thereafter inasmuch as no proper offer of reinstatement has been made.

[41]Clarence Goold is not entitled to reinstatement.

[42]Cf. *Charles H. McCauley Associates, Inc.*, 266 NLRB No. 120.

[43]In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Supplemental Order

Respondent Seligman & Associates, Inc., its officers, agents, successors and assigns shall pay to David Younce and Susan Younce, in accordance with the above computations the sums of $22,947.37 and $4,610.59 respectively.[44] Interest is to be added at the rate of 6 percent per annum on the basis of the quarterly amounts of backpay due, in accordance with the formula set forth in *Isis Plumbing & Heating Co,* 138 NLRB 176. There should be deducted from the amount due any tax withholding required by federal and state law.

The notice hereto attached as Appendix A has been amended to reflect that Respondent has offered reinstatement to certain discriminatees and has entered into a settlement agreement to make them whole for the losses incurred by them due to Respondent's unlawful acts. The amended notice is to be posted in lieu of the original notice under the same conditions required by the Board in its original order.[45]

Dated at Washington, DC, December 29, 1983.

William F. Jacobs
Administrative Law Judge

[44]Computed through the first quarter 1983. Backpay continues to run.
[45]240 NLRB 110 at 111.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT interfere with our employees' rights under Section 7 of the National Labor Relations Act, as amended, or discourage membership in Local 79, Service Employees International Union, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against our employees in regard to hire or tenure of employment or any other term or condition of employment.

WE WILL NOT coercively interrogate or threaten our employees, or prohibit you from talking to new employees about the Union.

WE WILL NOT transfer, promote, or reclassify our employees in an attempt to gerrymander the unit in an NLRB election.

WE WILL NOT threaten to discharge our employees for testifying at an NLRB hearing.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL offer David Younce and Susan Younce full, immediate and unconditional reinstatement to their former jobs or, if there jobs no longer exist, to substantially equivalent jobs, without prejudice to seniority or other rights and privileges previously enjoyed; and WE WILL make them whole for any loss of pay suffered by reason of the discrimination against them, with interest.

WE HAVE made Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson and Madeline Dodson whole for any loss of pay suffered by reason of the discrimination against them, in accordance with the settlement agreement entered into by the parties at the backpay hearing in the instant proceeding.

WE HAVE made unconditional offers of reinstatement to Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson and Madeline Dodson and these offers have been refused.

SELIGMAN & ASSOCIATES, INC.,
AND ITS WHOLLY OWNED DIVISION,
SCOTT MANAGEMENT COMPANY

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Patrick V. McNamara Federal Building, Detroit, MI 48226, Telephone No. (313) 226-3244.

JD-556-83

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SELIGMAN & ASSOCIATES, INC.
AND ITS WHOLLY OWNED DIVISION,
SCOTT MANAGEMENT COMPANY

and

LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO Case Nos. 7-CA-13576
7-CA-13752 (1-4)
7-CA-13948
7-CA-14086

DAVID YOUNCE, An individual

ERRATUM

The first paragraph of the Supplemental Order is hereby corrected to read as follows:

Respondent Seligman & Associates, Inc., its officers, agents, successors and assigns shall pay to David Younce and Susan Younce, in accordance with the above computations the sums of $22,947.37 and $4,610.59 respectively.[44] Interest is to be computed in the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977) (see also *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962). There should be deducted from the amount due any tax withholding required by federal and state law.

Dated: Washington, DC, January 13, 1984.

William A. Jacobs
Administrative Law Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SELIGMAN AND ASSOCIATES, INC., AND ITS WHOLLY OWNED DIVISION, SCOTT MANAGEMENT COMPANY,

Respondent.

No. 85-5404

June 8, 1987

JUDGEMENT

Before: ENGEL, KENNEDY and MILBURN, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of a supplemental order issued by it against Respondent, Seligman & Associates, Inc. and its wholly owned Division, Scott Management Company, Southfield, Michigan, its officers, agents, successors, and assigns on 14 December 1984. The Court heard argument of respective counsel on 28 April 1986, and has considered the briefs and transcript of record filed in this cause. On 30 December 1986, the Court, being fully advised of the premises, handed down its opinion granting in part and denying in part enforcement of the Board's Supplemental Order and remanding the case to the Board for further proceedings consistent with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Seligman & Associates, Inc. and its wholly owned Division, Scott Management Company, Southfield, Michigan,

its officers, agents, successors, and assigns, reimburse BiCounty Hospital, Warren, Michigan, $1200 and Doctor John Barkay $660.50 for medical services rendered Clarence Goold for injuries suffered while in the employment of the Respondent and to post the notice attached hereto as Appendix, which has been amended to reflect that Respondent has offered reinstatement to certain discriminatees and has entered into a settlement agreement to make them whole for losses incurred by them due to Respondent's unlawful acts. The amended notice is to be posted in lieu of the original notice under the same conditions required by the Board in its original order.[1]

It is further ORDERED AND ADJUDGED by the court that the case is remanded to the Board for further proceedings consistent with the court's opinion.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Leonard Green, Chief Deputy

[1]240 NLRB 110 at 111.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING IN PART, DENYING IN PART AND REMANDING IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT interfere with our employees' rights under Section 7 of the National Labor Relations Act, or discourage membership in Local 79, Service Employees International Union, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against our employees in regard to hire or tenure of employment or any other term or condition of employment.

WE WILL NOT coercively interrogate or threaten our employees, or prohibit them from talking to new employees aobut the Union.

WE WILL NOT transfer, promote, or reclassify our employees in an attempt to gerrymander the unit in an NLRB election.

WE WILL NOT threaten to discharge our employees for testifying at an NLRB hearing.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer David Younce and Susan Younce full, immediate, and unconditional reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed; and WE WILL make them whole for any loss of pay suffered by reason of the discrimination against them, with interest.

WE WILL reimburse BiCounty Hospital and Doctor John Barkay for medical service rendered Clarence Goold as a result of a work-connected accident.

WE HAVE made Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson whole for any loss of pay suffered by reason of the discrimination against them, in accordance with the settlement agreement entered into by the parties at the backpay hearing in the instant proceeding.

WE HAVE made unconditional offers of reinstatement to Larry Davis, Ricky Davis, Charles Davis, Mark Rushing, Harold Dodson, and Madeline Dodson and these offers have been refused.

SELIGMAN & ASSOCIATES, INC.
AND ITS WHOLLY OWNED DIVISION,
SCOTT MANAGEMENT COMPANY

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone No. 313-226-3244.

No. 85-5405

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SELIGMAN & ASSOCIATES, INC., and its Wholly Owned Division, Scott Management Company,

Respondent.

/

ORDER

Before: ENGEL, KENNEDY and MILBURN, Circuit Judges.

After carefully reviewing the petition for rehearing in the above case the panel is of the opinion that it is without merit.

IT IS ORDERED that the petition for rehearing be and it is hereby DENIED.

ENTERED BY ORDER OF THE COURT

July 28, 1987

Clerk

(2)

No. 87-742

Supreme Court, U.S.
FILED
DEC 18 1987
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

SELIGMAN & ASSOCIATES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner failed to make an unconditional offer of reinstatement to employees whom it had previously discharged unlawfully, and that its backpay liability therefore should not be tolled.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-742

SELIGMAN & ASSOCIATES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 808 F.2d 1155. The supplemental decision and order of the National Labor Relations Board (Pet. App. 27-38), including the decision and recommended order of the administrative law judge (Pet. App. 39-59), is reported at 273 N.L.R.B. 1216. A prior opinion of the court of appeals, enforcing the Board's order in the underlying unfair labor practice proceeding, is reported at 639 F.2d 307, cert. denied, 454 U.S. 838 (1981). The Board's decision and order in the unfair labor practice proceeding is reported at 240 N.L.R.B. 110 (1979).

JURISDICTION

The judgment of the court of appeals (Pet App. 61-62) was entered on December 30, 1986. An order denying a petition for rehearing was entered on July 28, 1987 (Pet. App. 65). The petition for a writ of certiorari was filed on October 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Seligman & Associates, Inc., operates a number of apartment complexes in the Detroit, Michigan area (Pet. App. 1). Prior to October 7, 1976, it employed Susan and David Younce as the caretakers of its Eureka Apartments complex (*id.* at 2). As compensation, it provided the Younces with both salaries and an apartment in the complex (*ibid.*).

On October 7, 1976, petitioner discharged the Younces and, approximately two weeks after that, sent the Younces a notice to quit the apartment (Pet. App. 2, 43). Susan Younce, however, filed an unfair labor practice charge with the National Labor Relations Board (Board) and, on the advice of its counsel, Irwin Alterman, petitioner decided to offer a settlement to the Younces consisting of (a) reinstatement at its Utica Green apartment complex, which is some 30 to 50 miles away from the Eureka Apartments, and (b) full backpay, less interim earnings (*id.* at 2, 43-44). Alterman contacted Board agent Whiteman, who had been assigned to the case, and asked him to convey petitioner's settlement offer to the Younces (*id.* at 2). Whiteman telephoned Susan Younce and asked her, "If [petitioner] offered you your job back with backpay, would you take it?" (*ibid.*). Younce replied that she would not do so (*ibid.*). Whiteman, in turn, telephoned Alterman and advised that the Younces did not want their jobs back (*id.* at 3).

In early November 1976, while her husband and three children were ill with the flu, Susan Younce contacted Scott Seligman, the son of petitioner's owner, and asked whether she and her family could remain in the apartment as paying tenants (Pet. App. 3). Scott Seligman replied that they could do so, provided that she dropped her unfair labor practice charge (*ibid.*). Accordingly, on November 8, 1976, Susan Younce told Board agent Whiteman that she wanted to drop the charge (*ibid.*).

Whiteman advised against doing so, but informed her that, if she wanted to relinquish the claim, she would have to do so in writing (*ibid.*). Younce relayed this information to Scott Seligman, who instructed her to obtain a withdrawal request form from the Board and to go to Alterman's office to sign a lease (*ibid.*).

Before Younce could meet with Alterman, however, the Younces received another eviction notice (Pet. App. 3). Accordingly, Susan Younce was quite nervous and upset when she met with Alterman the next day (*id.* at 3-4). Alterman informed her that, in order to obtain a lease, she would have to sign an affidavit describing her attempts to withdraw her unfair labor practice charge (*ibid.*). He then dictated an affidavit and a letter withdrawing the charge, both of which Susan Younce agreed to sign (*ibid.*). In addition, she indicated that she was not interested in reinstatement (*id.* at 30).

2. The General Counsel of the Board subsequently filed an unfair labor practice complaint against petitioner based on a later unfair labor practice charge filed by David Younce (Pet. App. 30, 47). On the basis of this complaint, the Board found that petitioner had discharged the Younces in retaliation for activity protected by Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1). See *Seligman & Associates, Inc.*, 240 N.L.R.B. 110, 114-116 (1979). The Board ordered petitioner to offer the Younces "reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs," and to make them whole for losses they suffered as a result of their discriminatory discharges (*id.* at 123). This order was enforced on appeal (639 F.2d 307, cert. denied, 454 U.S. 838 (1981)).

In the related compliance proceeding, the Board, with one member dissenting, rejected petitioner's contention that it had made a valid reinstatement offer to the Younces

which they had rejected, thus tolling further backpay liability (Pet. App. 27-38). The Board agreed with the finding of an administrative law judge that "there is no credible evidence that [petitioner] ever made a legitimate reinstatement offer to the Younces" (*id.* at 31), noting that "the reinstatement offer received by Susan Younce from Board agent Whiteman was hypothetical, and therefore did not provide her with the opportunity to make a considered choice whether to accept reinstatement" (*id.* at 30), that "the Younces were offered similar but not equivalent jobs at the [petitioner's] Utica Green apartment complex, not the Eureka complex where they had worked prior to their unlawful discharge, and such offers of work at a different location and for different management are not sufficient to toll backpay" (*ibid.* (footnote omitted)), and that petitioner, "by electing to convey its restatement offer through [the] Board agent instead of proffering it directly, is bound by any resulting confusion" (*ibid.*). The Board also rejected the view of its dissenting member that Susan Younce had renounced any interest in reinstatement during her meeting with attorney Alterman (*id.* at 31); it found that her "statement that she did not want to be reinstated was made under coercive circumstances" (*id.* at 32) and that she therefore "did not voluntarily reject * * * a proper offer" (*ibid.*). The Board ordered petitioner to pay $27,557.96 in backpay to the Younces (*id.* at 53-56).

3. The court of appeals enforced the Board's order in pertinent part (Pet. App. 1-26).[1] Initially, it noted that petitioner's offer to the Younces of reinstatement at the Utica Green complex, instead of employment at the

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[1] The Board had rejected petitioner's contention that the Younces failed to mitigate backpay liability by not seeking substantially equivalent employment which was readily available (Pet. App. 49-53). The court of appeals disagreed with this aspect of the Board's decision and remanded the case for recomputation of the backpay award (*id.* at 17-26).

Eureka Apartments, did not satisfy the terms of the Board's prior order that petitioner offer the Younces reinstatement to their former jobs, unless those jobs were no longer in existence; the court concluded that "[t]he conditional offer of alternative employment, therefore, could not have tolled [petitioner's] backpay obligation" (*id.* at 8). The court also noted that "Whiteman's comments in relaying [petitioner's] offer did not 'establish[] unequivocally that * * * there [was] a position [and] that the job was immediately available' " (*id.* at 10 (citation omitted)); moreover, citing this Court's decision in *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), it said that "the burden of Board errors" must be borne by the employer (Pet. App. 11). Finally, it agreed that neither "Susan Younce's refusal of the offer as conveyed by Board agent Whiteman [n]or her subsequent repudiation of any desire to seek reinstatement" constituted an effective waiver of reinstatement rights (*id.* at 12), reasoning, with respect to the first point, that "an employee is under no obligation to decide whether to accept reinstatement until an unconditional offer of reinstatement is made" (*id.* at 14), and, with respect to the second point, that "substantial evidence supports the Board's findings that Susan Younce's conduct at that period did not amount to a waiver of the parties' right to reinstatement" (*id.* at 16).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Section 10(c) of the Act vests the Board with remedial authority to expunge the effects of unfair labor practices, including the power to order "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]" (29 U.S.C. 160(c)). "Reinstatement is the conven-

tional correction for discriminatory discharges" (*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 187 (1941)). The Board, therefore, with approval of the courts, has long held that, unless and until a discriminatee receives an unequivocal offer of reinstatement to his or her former job (assuming that it is available), any attempt by the discriminatee to waive reinstatement will be deemed ineffective and backpay will continue to accrue until a valid offer is made. See *Don Pizzolato, Inc.*, 249 N.L.R.B. 953, 956 (1980); *Heinrich Motors, Inc.*, 166 N.L.R.B. 783, 785-786 (1967), enforced, 403 F.2d 145, 150 (2d Cir. 1968); *W.C. McQuaide, Inc.*, 239 N.L.R.B. 671 (1978), enforced, 617 F.2d 349 (3d Cir. 1980); *Lyman Steel Co.*, 246 N.L.R.B. 712, 714 (1979); *Dobbs Houses*, 182 N.L.R.B. 675, 681-682 (1970); *Lipman Bros.*, 164 N.L.R.B. 850, 853 (1967).

The decision below follows directly from these well settled principles. The Board found, and the court below agreed, that petitioner's offer of reinstatement to Susan Younce through Board agent Whiteman was hypothetical in nature, that the offer of reinstatement involved a different position at a location some 30 to 50 miles from the Younces' previous place of employment (even though their former jobs were still available), and that petitioner coerced Susan Younce into expressing disinterest in reinstatement by threatening to evict her family from its apartment and by insisting that withdrawal of her unfair labor practice charge was the price for obtaining a rental apartment. In these circumstances, it was clearly within the discretion of the Board to hold that petitioner's backpay liability was not tolled.

2. Petitioner does not deny that it never offered the Younces reinstatement to their former position at the Eureka Apartments or that the offer conveyed to the Younces by Board agent Whiteman was only hypothetical. Rather, petitioner's basic objection is (Pet. 6-8) that it

should not be made to suffer the detrimental effects of Board agent Whiteman's erroneous transmission of the non-hypothetical offer that petitioner actually conveyed to him. As the court below recognized (Pet. App. 11), however, this Court's decision in *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), is dispositive of that objection. In *Rutter-Rex Mfg. Co.*, the Court faced the question whether the Board may be required to reduce backpay liability that is attributable to delay on the Board's part in issuing backpay specifications. The Court held that "the Board is not required to place the consequences of its own delay, even if inordinate, upon [the] wronged employees to the benefit of wrongdoing employers" (*id.* at 265). Similarly, the Board is not required to place the consequences of its agents' misstatements upon the wronged employees to the benefit of wrongdoing employers. Moreover, as both the Board (Pet. App. 30) and the court of appeals (*id.* at 11-12) noted, petitioner selected the Board's agent as its messenger and, as between petitioner and its wronged employees, petitioner is responsible for the fact that the message went partly astray.

3. There is no merit to petitioner's contention (Pet. 7-10) that the decision below conflicts with the decision of the District of Columbia Circuit in *Consolidated Freightways* v. *NLRB*, 669 F.2d 790 (1981). In that case, the Board refused to consider the employer's contention that, although its offer of reinstatement was invalidly conditioned, its backpay liability was nonetheless tolled because the discriminatee had rejected the offer for another reason (which he had no right to assert); the Board ruled that it would not consider the contention because the employer had not filed exceptions to the ALJ's ruling on this issue. The court of appeals, however, found that the issue had indeed been raised before the Board and that Board precedent did not consistently resolve whether an employee's reasons for refusing an invalid offer of

reinstatement are relevant to the determination of an employer's backpay liability (669 F.2d at 795). Accordingly, the court remanded the case to the Board to "explicate the circumstances, *if any,* under which an inquiry into whether an employee would have rejected a valid offer of reinstatement is proper" (*id.* at 798 (emphasis added; footnote omitted)). In this case, the Board has made clear that "only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled"; the employee's reasons for rejecting an invalid offer are not relevant (Pet. App. 31 (footnote omitted)). Thus, the decision below merely answers the question posed by the court of appeals in *Consolidated Freightways.*[2]

[2] Petitioner similarly errs in suggesting (Pet. 8-10) that the decision in *Heinrich Motors, Inc.* v. *NLRB,* 403 F.2d 145 (2d Cir. 1968), makes an employee's reasons for rejecting an invalid offer relevant to the tolling question. The court in *Heinrich Motors* in fact enforced a Board order applying the same rule that was applied in this case. See 166 N.L.R.B. at 785-786, enforced, 403 F.2d at 150.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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